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The Texas case of Delz v. Winfree, reported elsewhere in this issue, which asserts the doctrine that a right of action exists against one who maliciously induces a tradesman to refuse to sell goods to the plaintiff, by which damage ensues to the latter, is in line with the principles enunciated in the English cases of Lumley v. Gye, and Bowen v. Hall, where suits for damages were successfully maintained for malicious interference by a stranger with the performance of a contract. The Kentucky court, in a recent case (Chambers v. Baldwin), repudiated the doctrine, but the current of authority and the logic of the law bears strongly in its favor. The same reasoning may be effectually applied to both cases, viz: that every wrongful act which produces actual injury to another, such injury being its natural and probable consequence, is actionable. For a statement of the principles governing this class of cases, see note to Chambers v. Baldwin, page 275, current volume of this JOURNAL.

The United States Supreme Court recently adjourned until October, after rendering some important opinions and breaking all former records in the number of cases disposed of during the term, the number being 617, whereas heretofore it has never been able to get off of its docket more than 500. This, we have no doubt, results in part from the infusion of younger blood upon the bench and a corresponding dispatch of its business. It will probably happen that when the new federal appellate courts are organized and get to work, the docket of the supreme court will be measurably relieved and ultimately cleared each term.

Several of the most important cases on the docket of that court have been decided within the past few weeks. Among them is the Kansas "Original Package" Case, the Buffalo Bank Case, the case of Pennsylvania v. The Pullman Palace Car Co., involving the validity and constitutionality of the State law taxing the company on a basis proportionate to the total number of miles of railroad within the State over which the company's cars ran, compared with the total number of miles of railroad in the United States over which they ran. The court, in an opinion by Mr. Justice Gray, holds that the law is valid and constitutional, and not in violation of the interstate commerce clause of the federal constitution. They regard the law, as not a regulation of commerce, but as an equitable method of taxing the property within the State. The court also decided a case from Massachusetts, involving practically the same question as applied to the lines of the Western Union Telegraph Co. in Massachusetts, in the same way.

A familiar line in one of Shakespeare's plays has helped the popular superstition, that when a man makes his will he is likely very soon to die. The statutes of some States (New York, for instance,) discriminate against death-bed wills, by prohibiting the bequeathing of money for religious purposes, unless the will be made more than a year before death. Yet people, who are not content with the disposition the law will make of the property they leave, persist in executing testamentary instruments at the last possible moment. An unusual ending was put to such an attempt the other day in a New Jersey town. A prominent and wealthy citizen was there dying in his bed. His will, hastily drawn, was placed before him, and a pen put into his hand with which to make the signature of his name, or subscription mark upon the paper. He was asked if it was his will, and assented. He made an effort to write. One stroke was accomplished, when his head sank upon the pillow, the pen dropped from his hand, and his heart ceased to beat. He was dead in the sight of the witnesses. This was in New Jersey, and the point, whether or not the will was executed, is for the courts of that State to decide. In some States the case would be a very doubtful one. It might depend upon the point whether the single stroke of the pen actually made was the "subscription" which the deceased intended to make, whether he had completed the subscription of the will when death palsied his

hand. At any rate the occurrence offers one more warning to will-makers, to accomplish their testamentary intentions while in full health and capacity.

NOTES OF RECENT DECISIONS.

HUSBAND AND WIFE — WIFE'S SEPARATE ESTATE—LIABILITY FOR NECESSARIES.— The Supreme Court of Missouri, in Bedsworth v. Bowman, 15 S. W. Rep. 990, decide that under Rev. Stat. Mo. 1879, § 3296, which provides that the wife's personal property shall be her separate property, and shall not be liable to be taken for the debts of the husband, but such property shall be subject to execution for any debt of her husband for necessaries for the wife or family, a wife's separate property cannot be seized on execution under a judgment against the husband alone, even though the judgment was for necessaries. McFarlane, J., says, *inter alia:*

It may have been within the power of the legislature to have made provision that the property of the wife, in so far as it might be required in the support of the family, could be taken under process against the husband alone. Such a meaning is so at variance with the evident intent of this act that it cannot be incorporated into it by implication. When all parts of an act are consistent with each other, and the intention is plain and unambiguous, we are not at liberty to go outside the law to seek an intent more in accord with our preconceived views than is manifest from the plain terms of the statute itself. State v. Gammon, 73 Mo. 421; State v. Hays, 78 Mo. 600. There is nothing remarkable or unusual in the principle incorporated into the law under this legislation, when viewed from an unprejudiced stand-point in regard to the domestic relations. The husband is and ever has been, under certain conditions, liable for any debt created by the wife for necessaries for herself and family. Why should not the wife be also for such debts created by the husband? No reason can be given where the wife owns the property. It was never held that the husband had only such a qualified interest in his own property that it could be taken under execution against the wife. To collect from the husband a debt contracted by the wife for necessaries no one would think for a moment of doing so by legal process against the wife alone. Formerly the husband was liable for the antenuptial debts of the wife. To satisfy such liability the legal process ran against the husband, and not the wife alone. The principle in these cases is not different from the principle recognized and enjoined by this statute. The wife being vested with the absolute control of her property, free from any interference on the part of the husband, could it be taken from her without due process of law? No such construction should be given the statute as would render it of doubtful constitutionality. The right of protection in the enjoyment of private property is no less sacred because owned by a married woman. "In judicial proceedings the law of the land requires a hearing before condemnation, and judgment before dispossession." Cooley, Const. Lim. 436. "By 'the law of the land' is most clearly intended the general law,—a law which hears before it condemns, which proceeds upon inquiry, and renders judgment only after trial." Mr. Webster, in Dartmouth College Case. Though section 3296 does not declare that the wife shall be notified, yet the law itself will imply that notice must be given as the *sine qua non* of jurisdiction and of judgment. Without notice no one can be passed upon either as to person or estate. Laughlin v. Fairbanks, 8 Mo. 367; Wickham Adm'r v. Page, 49 Mo. 526; Brown v. Weatherby, 71 Mo. 152; Ray. Co. v. Barr, 57 Mo. 290; Wells, Jur. § 82. Though a married woman's separate estate in equity could not be charged in consequence of her note given unless she be made a party to the proceeding which would seek to enforce the charge created by a decree, so by parity of reasoning her statutory separate estate cannot be charged without she be made a party to the proceeding which seeks to enforce such statutory charge. Indeed, the argument is stronger in favor of her being made a party to the latter proceeding than to the former, because in the former it was her own act which makes the charge, and lays the foundation for the decree; while in the latter it is done by another person; it may be, without her knowledge or consent, and without the existence of the facts necessary to create the charge. In the States of Iowa, Illinois, Alabama, Pennsylvania, and Mississippi are statutes similar to the one under consideration. Though many cases involving the construction of these statutes have been reported, none has been found in which an attempt was made to charge the wife or her property without making her a party, and giving her an opportunity to be heard. This argues that the wife is, by the courts of those States, regarded as a necessary party to a suit in which her property rights are involved. In Pennsylvania and Alabama the courts have repeatedly decided that both the pleading and the evidence must show a case of the wife's liability under the statute. Childress v. Mann, 33 Ala. 207; Sawtelle's Appeal, 84 Pa. St. 310; Hoff v. Koerper, 103 Pa. St. 396. In a case in Iowa the husband had given his note for necessaries, payable at a future day. The court held that the cause of action accrued against both husband and wife at the maturity of the note. There was a cause of action against the wife. Lawrence v. Sinnamon, 24 Iowa, 80. If the husband bought a bill of groceries, professedly as necessaries for the wife and family, but in reality for another purpose, it might be very doubtful, on general principles, whether he could charge her separate statutory estate for such professed necessaries. Bank v. Laveille, 52 Mo. 380; Morrison v. Hancock, 40 Mo. 565; Deardorff v. Everhartt, 74 Mo. 38. Not a single precedent, it is believed, can be found in the whole range of equity jurisprudence where a married woman's separate estate has been charged by a decree unless she was made a party to the proceeding, notwithstanding she signed the note, and notwithstanding her husband signed it with her. Riddick v. Walsh, 15 Mo. 519. There are as many issuable facts to be determined in a suit to subject her statutory separate estate to sale under execution for necessaries purchased by the husband for herself and family, as are ordinarily necessary to charge her separate equitable estate, for a debt of her own creating, by a decree in equity. In the former, before her property can be aken under execution, it must be shown that a debt

was created by the husband; that it was for necessaries, not for the husband, but for herself and family, and that the estate to be subjected to sale is her statutory separate property. If the wife is to be deprived of a hearing, who is to be the judge of her liability,—the husband, the creditor, or the executive officer? The husband may collude with the creditor to subject her property to the payment of his debts, and thereby preserve his own. The property may be taken under process against the husband, and disposed of without her knowledge. After her property has been seized under execution, she may not be able to avail herself of the remedies afforded by the law on account of inability to give the bond required. Her rights and interests alone are to be affected, and she is entitled to a hearing before, and not after, judgment. While we do not regard it of much practical importance, in view of the present statutes respecting the rights and liabilities of married woman, we deem it proper to say that we do not regard the statutory estate of the wife as being of the same character as was her equitable separate estate at common law, which could only be charged by a decree in equity.

EVIDENCE—SECONDARY EVIDENCE — WHEN ADMISSIBLE—DILIGENCE. — Of the diligence required to be shown by a party in the search for an original writing, in order to admit of secondary evidence of its contents, the Supreme Court of Oregon, in Wiseman v. Northern Pac. R. Co., 26 Pac. Rep. 272, says:

No precise rule has been or can be laid down as to what shall be considered a reasonable effort, but the party alleging the loss or destruction of the document is expected to show "that he has in good faith exhausted in a reasonable degree, all the sources of information and means of discovery which the nature of the case would naturally suggest, and which were accessible to him." 1 Greenl. Ev. § 558; Simpson v. Dall, 3 Wall. 460; Johnson v. Arnwine, 42 N. J. Law, 451; Kelsey v. Hanmer, 18 Conn. 310. Thus, in Mariner v. Saunders, 5 Gilman, 117, the court say: "From the nature of the subject there is some difficulty in laying down a general rule defining the extent and vigilance of the search which a party must make before the court may conclude that the paper is destroyed or lost." As a general rule, however, we may say that when, from the ownership, nature, or object of a paper, it has properly a particular place of deposit, or where, from the evidence, it is shown to have been in a particular place, or in particular hands, then that place must be searched by the witness proving the loss, or the person produced into whose hands it has been traced. The extent of the search to be made in such place or by such person must depend in a great degree upon the circumstances. Ordinarily it is not sufficient that the paper is not found in its usual place of deposit, but all papers in the office or place should be examined. On the whole, the court must be satisfied that the paper is destroyed, and cannot be found. It is true the party need not search every possible place where it might be found, for then the search might be interminable, but he must search every place where there is a reasonable probability that it may be found." This rule is founded on reason and justice, and to require any less degree of diligence would be to efeat the object of reducing agreements to writing. As was said in Rankin v. Crow, 19 Ill. 629: "The party wishing to avail himself of the benefit of such secondary evidence should be required to make at least the same effort that is expected the party would make if he were to lose the benefit of the evidence if the instrument were not found." The degree of diligence which shall be considered necessary, in any case, will depend upon the character and importance of the document, and the purposes for which it is expected to be used, and the place where a paper of that kind may naturally be supposed to be found. If the document be a valuable and important one, which the owner would be likely to preserve, a more diligent search will be required than if the document is of little or no value. The purposes for which it is proposed to use it on the trial will also have an important bearing in determining the degree of diligence required. If the cause of action or defense is founded on the supposed writing, the party offering the evidence will be required to show a greater degree of diligence in the attempt to produce the original than if it is desired to be used as evidence in some collateral matter. The proof of search and proof of loss required is always proportionate to the character and value of the paper supposed to be lost. Insurance Co. v. Rosenagle, 77 Pa. St. 514. The existence and contents of the supposed contract, as well as the claim of defendant based upon it, is denied by the plaintiff in the case at bar. The issue thus being joined, its execution and contents were very material to defendant in establishing its defense. Indeed, defendant seeks to exempt itself from liability solely by reason of this contract. It admits having received, as a common carrier, plaintiff's goods, and that while in its possession they were destroyed, but it seeks to escape liability by virtue of this contract. It then became of the utmost importance to both plaintiff and defendant that the original contract, if such a contract was made at all, be produced on the trial, so that there might be no controversy as to its contents, and that the court might declare its legal effect to the jury. Before defendant should be permitted to give secondary evidence of its contents it should prove that it had exercised the utmost diligence to procure the original (Smith v. Cox, 9 Oreg. 327), and this it failed to do. No competent evidence whatever was offered to prove any search in the office of the traffic manager at Chicago, where it was shown the document was most likely to be found. All that the witness Watts said about the supposed search was clearly hearsay and incompetent evidence. Lawrence v. Fulton, 19 Cal. 683. It did not in any way tend to prove that any effort had been made in the Chicago office to find the original paper. The testimony of the traffic manager, or some person in his office, having the custody of such papers, should have been had, or some proper effort made to obtain it, showing what effort, if any, had been made to find the original.

Indeed, counsel for defendant did not seriously contend that it had brought itself within the rule concerning the admission of secondary evidence, if proof of the loss of the original is required, but he claimed that all that was necessary for defendant to do was to show that the original was in the possession of a person outside of this State, and that no further proof was required; that, when it showed that the original contract was in Chicago, it was entitled to give secondary evidence of its contents without further proof; and in support of his position cites the following authorities: Burton v. Driggs, 20 Wall. 134; Gordon v. Searing, 8 Cal. 49; Beattie v. Hilliard, 55 N. H. 428; Brown v. Woods, 19 Mo. 475; Shepard v. Giddings, 22

Conn. 282; Ralph v. Brown, 3 Watts & S. 395; Gordon v. Tweedy, 74 Ala. 232. The broad doctrine in stated in these authorities that, if books or papers necessary as evidence in a court in one State be in the possession of a person living in another State, secondary evidence, without further showing, may be given to prove the contents of such papers. As we have already said, in effect, each case must largely depend on its own particular circumstances as to what showing is sufficient in order to admit secondary evidence of the contents of a writing, and the language used in the cases above cited must be interpreted in the light of the facts of each case. None of these cases go so far as to hold that where a defendant relies upon the contents of a writing to exempt himself from liability, and both the execution and contents of the supposed writing are denied, and the alleged writing is shown to be in the possession of a person outside of the State, secondary evidence of the contents of such writing is admissible unless an effort is made to produce it. And, besides, the doctrine stated in these authorities is denied by authorities of equal weight, and even by some of the same courts. Thus, in Turner v. Yates, 16 How. 14, it was held that proof that an invoice of goods was in London was not a sufficient showing to admit secondary evidence of its contents, in the circuit court of the United States for the district of Maryland, the court saying: "If the paper was in the hands of the consignees in London, secondary evidence was not admissible; if as parties, they were entitled to notice to produce the paper; if as third persons, their depositions should have been taken, or some proper attempt made to obtain it." To the same effect are Hoyt v. McNeil, 13 Minn. 394, (Gil. 362); Dickinson v. Breeden, 25 Ill. 186; McGregor v. Montgomery, 4 Pa. St. 237; Whart. Ev. § 130.

CONSPIRACY — COMBINATION IN TRADE — INTERFERENCE WITH BUSINESS— DAMAGES.— The question presented in Delz v. Winfree, 16 S. W. Rep. 111, decided by the Supreme Court of Texas, is of novel interest. It is there held that no action for conspiracy will lie by a butcher against several dealers in beef cattle because they have combined to refuse to sell him beeves; but where defendants also induced a certain dealer in slaughtered meat to likewise refuse to sell him, such interference with his business is a cause of action. Henry, J., says:

The appellee contends that, at common law, "a conspiracy cannot be made the subject of a civil action, although damages result, unless something is done which, without the conspiracy, would give a right of action. In other words, an act, which, if done by one alone, constitutes no ground of action, cannot be made the ground of such action by alleging it to have been done by and through a conspiracy of several. That the true test as to whether such action will lie is whether or not the act accomplished after the conspiracy has been formed is itself actionable." We think that the proposition here asserted is well sustained by the authorities, and the first question to be determined is whether, on account of the acts charged by plaintiff against the defendants, he would have had a cause of action against either of them if no conspiracy had been charged. If he would have had, then he may maintain his action for conspiracy. If he could not have sustained a separate action against either of the defendants on account of the matters complained of, the additional charge of a conspiracy will not give it. Cooley, Torts, 125; Kimball v. Harman, 34 Md. 407; Laverty v. Vanarsdale, 65 Pa. St. 507.

The appellee also asserts the following proposition, which may be conceded to be correct: "A person has an absolute right to refuse to have business relations with any person whomsoever, whether the refusal is based upon reason, or is the result of whim, caprice, prejudice or malice, and there is no law which forces a man to part with his title to his property." The privilege here asserted must be limited, however, to the individual action of the party who asserts the right. It is not equally true that one person may from such motives influence another person to do the same thing. If, without such motive, the cause of one person's interference with the property or privileges of another is to serve some legitimate right or interest of his own, he may do acts himself, or cause other persons to do them, that injuriously affect a third party, so long as no definite legal right of such third party is violated. In the case of Walker v. Cronin, 107 Mass. 562, it was recognized to be a general principle that, "in all cases where a man has a temporal loss or damage by the wrong of another, he may have an action upon the case to be repaired in damages. The intentional causing of such loss to another, without justifiable cause, and with malicious purpose to inflict it, is of itself a wrong." "There are, indeed, many authorities which appear to hold that, to constitute an actionable wrong, there must be a violation of some definite legal right to the plaintiff. But those are cases, for the most part, at least, where the defendants were themselves acting in the lawful exercise of some distinct right, which furnished the defense of a justifiable cause for their acts, except so far as they were in violation of a superior right in another." "Thus every one has an equal right to employ workmen in his business or service; and if by the exercise of this right, in such manner as he may see fit, persons are induced to leave their employment elsewhere, no wrong is done to him whose employment they leave, unless a contract exists by which such other person has a legal right to the further continuance of their services. If such a contract exists, one who knowingly and intentionally procures it to be violated may be held liable for the wrong, although he did it for the purpose of promoting his own business." "Every one has a right to enjoy the fruits and advantages of his own enterprise, industry, skill, and credit. He has no right to be protected against competition, but he has a right to be free from malicious and wanton interference, disturbance, or annoyance. If disturbance or loss come as a result of competition, or the exercise of like rights by others, it is *damnum absque injuria*, unless some superior right, by contract or otherwise, is interfered with. But if it come from the merely wanton or malicious acts of others, without the justification of competition or the service of any interest or lawful purpose, it then stands upon a different footing." Plaintiff's petition goes further than to charge that each of the defendants refused to sell to him. It charges that they not only did that, but that they induced a third person to refuse to sell to him. It does not appear from the petition that their interference with the business of plaintiff was done to serve some legitimate purpose of their own, but that it was done wantonly and maliciously, and that it caused, as they intended it should, pecuniary

loss to him. We think the petition stated a cause of action, and that the demurrer should have been overruled. The judgment is reversed, and the cause is remanded.

ASSIGNMENT—CHECK — EQUITABLE ASSIGNMENT OF FUND.—The authorities upon the question decided by the Supreme Court of Ohio, in Covert v. Rhodes, 27 N. E. Rep. 94, are more or less in conflict. It is there held that a bank check or draft for a part of the sum due the drawer does not, before acceptance by the drawee, constitute an equitable assignment of the amount for which it is drawn. When, after the drawing of such check or draft, the drawer makes an assignment of all his property for the benefit of creditors, and notice of the assignment is received by the drawee before the check or draft is presented for acceptance or payment, the title to the whole amount standing to the credit of the drawer at the time of the assignment passes to the assignee for the equal benefit of all the creditors. The holder of the check or draft is not entitled to priority over the other creditors. Williams, J., after calling attention to the conflict of authority and citing Pomeroy on Equity Jur. § 1284, and Mr. Justice Davis in Bank v. Millard, 10 Wall, 152. says:

The subject has been discussed in all its bearings in the various reported cases, and, without extending the discussion, our conclusion is that a check or draft for a part only of the sum due the drawer does not, before acceptance, constitute an equitable assignment of the amount for which it is drawn; and where, after it is drawn, the drawer makes an assignment of all his property for the benefit of creditors, notice of which is received by the drawee before acceptance, the property in the whole amount then remaining to the credit of the drawer passes to the assignee, for the equal benefit of all the creditors, and the holder of the check or draft has no priority over the other creditors. We concur with Mr. Justice Miller, in his opinion in the case of Bank v. Schuler, 120 U. S. 515, 516, 7 Sup. Ct. Rep. 644, that "it is not easy to see any valid reason why the assignment of an insolvent debtor for the equal benefit of all his creditors, and all his property, does not confer on those creditors an equity equal to that of the holder of an unpaid check upon his bankers. The holder of this check comes into the distribution of the funds in the hands of the assignee for his share of those funds with other creditors. The mere fact that he had received a check a few days before the making of the assignment, on the bank, which had not been presented until after the general assignment was made and notified to the bank, does not seem, in and of itself, to give any such superiority of right. The assignment was complete and perfect, and vested in the assignee the right to all the property of the assignor immediately upon its execution and delivery, with due formalities, to the assignee, and the check of this assignee * * * could have been paid by the bank with safety, if first presented. The check given by the same assignor a few days before was only an acknowledgment of a debt by that assignor, and became no valid claim upon the fund against which it was drawn until the holder of those funds was notified of its existence. This, we think, is the fair result of the authorities on that subject." Among the many cases which sustain this view, the following are directly in point; Grammel v. Carmer, 55 Mich. 201, 21 N. W. Rep. 418; Dickenson v. Coates, 79 Mo. 250; Bullard v. Randall, 1 Gray, 605; Attorney General v. Insurance Co., 71 N. Y. 325; Kimball v. Donald, 20 Mo. 577; Loyd v. McCaffrey, 46 Pa. St. 410; Chapman v. White, 6 N. Y. 412; Dykers v. Bank, 11 Paige, 612; Hopkinson v. Forster, L. R. 19 Eq. 74; Moses v. Bank, 34 Md. 574.

While, however, we regard it as well settled that a draft or check for a part only of the draweer's deposit, or sum due him, does not operate as an equitable assignment, a different rule seems to obtain where an order, draft, or check is drawn for the whole amount of the deposit, or the exact sum due. There may be, in such case, it is said, a sufficient designation of the specific fund to be transferred, to constitute an equitable assignment. This distinction is made by many well-considered cases, among them Moore v. Davis, 57 Mich. 251, 23 N. W. Rep. 800; Bank v. Railway Co., 52 Iowa, 378-384, 3 N. W. Rep. 395; Mandeville v. Welch, 5 Wheat. 277; Kingman v. Perkins, 105 Mass. 111; Macomber v. Doane, 2 Allen, 541; Robbins v. Bacon, 3 Me. 346; Gibson v. Cook, 20 Pick. 15-17. In the opinion of the court in Moore v. Davis, *supra*, Cooley, C. J., discussing the distinction between the two classes of cases, says: "In the recent case of Grammel v. Carmer, 55 Mich. 201, 21 N. W. Rep. 418, the question whether a draft was an assignment of the fund in the drawee's hands, to the extent of the sum drawn for, was considered and decided in the negative. That, however, was the case of a banker's draft, and it was not drawn for the whole fund in the drawee's hands. Many cases were cited in the opinion filed in that case, and the following, not then cited are to the same effect: Shand v. DuBuisson, L. R. 18 Eq. 283; Lewis v. Bank, 30 Minn. 134, 14 N. W. Rep. 587; Jones v. Wood, etc. Co., 13 Nev. 359; Rosenthal v. Bank, 17 Blatchf. 318; Dolsen v. Brown, 13 La. Ann. 551; Sands v. Matthews, 27 Ala. 399. But this case differs from Grammel v. Carmer, in the fact that the draft now in question was drawn for the exact amount of a sum claimed to be due from the drawees to the drawer for a bill of merchandise, and that the account was attached to the draft, evidently for the purpose of being sent forward with it. When thus sent forward, it would explain to the drawees the account on which it was drawn; but it must also have been understood to serve a further purpose, namely, to be evidence in the hands of the drawees that the account was paid when the draft was taken up by them. There could be no sufficient reason for attaching it at all, unless it was understood that payment of the draft would be payment of the account as well. By the general commercial law, as was said in Grammel v. Carmer, the purchaser of a draft is supposed to take it in reliance upon the responsibility of the drawer, and he has no other reliance until it is accepted. This is the general rule. But if the draft is for the whole amount of a fund, the draft may, in connection with other circumstances, tend to show an intent that should operate an assignment." Gardner v. Bank, 39 Ohio St. 600, belongs to this latter class of cases.

EFFECT OF OTHER OR DOUBLE INSURANCE UPON MORTGAGEE'S INSURANCE.

1. Both Mortgagor and Mortgagee may Insure the Property Mortgaged.
2. Rule Extends to any one holding a Specific Lien.
3. Other Instances.
4. Other or Double Insurance.
5. A Mortgagor or Mortgagee cannot be compelled to *pro rate* with others.
6. "Union Mortgage Clause."

1. *Both Mortgagor and Mortgagee May Insure the Property Mortgaged.*—It is no longer doubted that a mortgagor may insure the property mortgaged in his own behalf, although he may have nothing more than a right in equity to redeem, even though such right has been sold on execution, the year or time for redeeming not having expired.[1] He may insure to the full value of the property mortgaged, and recover the amount insured if he has a right to redeem at the time of the loss.[2] This right continues after the owner of land has conveyed his title by a deed absolute on its face, if such conveyance was intended as a mortgage.[3] So a mortgagor of personal property may insure it in his own behalf.[4] So the mortgagee may insure the mortgaged premises to the amount of his debt,[5] and different mortgagees of the same property have such independent interests that each may insure the property mortgaged to the extent of his debt.[6] An executory contract by a mortgagee to convey or assign his interest in a mortgage, does not deprive him of the right to insure, nor limit his right to recovery to the amount of the unpaid purchase money.[7] But if the debt of the mortgagee has been extinguished or he has transferred it before the loss, he cannot recover the amount of the insurance;[8] though it would be different if a transfer were made after suit brought.[9] So a mortgagor's insurable interest is not divested by an unauthorized foreclosure sale and confirmation which is afterwards set aside, even though the loss occur after the confirmation and before it is vacated.[10] But he cannot insure after the period of redemption has expired.[11]

2. *Rule Extends to Anyone Holding a Specific Lien.*—The same rule applicable to mortgagors and mortgagees is applicable to any persons who are the owners of property and to those who have specific liens thereon, such as a mechanic's lien,[12] but not to a general judgment lien.[13]

3. *Other Instances.*—So a like rule prevails with reference to vendor and vendee;[14] lessor and lessee;[15] consignor and consignee;[16] bailor and bailee,[17] and pledgeor and pledgee.[18]

4. *Other or Double Insurance—Pro Rating.*—In the case of insurance by two or more persons of the same property, a very material question arises whether a *pro rating* of insurance can be insisted upon. Thus, suppose the mortgagor insured, and in his policy it is provided that if any other insurance is placed thereon the insurer shall not be liable for a greater proportion of any loss sustained by the insured upon the property insured, than the sum insured bears to the whole sum insured thereon. It may be said generally that this is not "other" or "double" insurance. Nearly all policies provide that if there be any other insurance upon the property insured of which no notice is given to the then insurer, or if any shall be placed upon the property insured at any time thereafter without the consent of the then insurer, the policy then

[1] Strong v. Manufacture Ins. Co., 10 Pick. 40; s. c., 20 Am. Dec. 507; Insurance Co. v. Stinson, 103 U. S. 25; Mechler v. Phœnix Ins. Co., 38 Wis. 665; Creighton v. Homestead Ins. Co., 17 Hun, 78; Walsh v. Philadelphia Fire Assn. 127 Mass. 383.

[2] *Id.*

[3] Hodges v. Tennessee F. & M. Ins. Co., 8 N. Y. 416.

[4] Kronk v. Birmingham Fire Ins. Co., 9 Ins. L. J. 26; s. c., 10 Pitts. L. J. (N. S.) 55; 37 Leg. Int. 195; 91 Pa. St. 300.

[5] Trader's Ins. Co. v. Robert, 9 Wend. 404; Foster v. Van Reed, 70 N. Y. 19; Haley v. Manf. Ins. Co., 120 Mass. 292; Fox v. Phœnix Ins. Co., 52 Me. 333; Kellar v. Merchant's Ins. Co., 7 La. Ann. 29; Insurance Co. v. Woodruff, 2 Dutch. 541.

[6] Fox v. Phœnix Ins. Co., 52 Me. 333.

[7] Haley v. Manf. Ins. Co., 120 Mass. 292.

[8] Carpenter v. Washington Ins. Co., 16 Pet. 495.

[9] Insurance Co. v. Woodruff, 2 Dutch. 541.

[10] Insurance Co. v. Sampson, 38 Ohio, 672.

[11] Essex Savings Bank v. Meriden Ins. Co., 57 Conn. 335.

[12] Carter v. Humboldt Fire Ins. Co., 12 Iowa, 287; Stout v. City Fire Ins. Co., 12 Ia. 371; Longhurst v. Star Ins. Co., 19 Ia. 364; Protection Ins. Co. v. Hall, 15 B. Mon. 411.

[13] Grevemeyer v. Southern Mut. Ins. Co., 62 Pa. St. 340.

[14] Ramsey v. Phœnix Ins. Co., 1 Fed. Rep. 396; Southern Ins. Co. v. Lewis, 42 Ga. 587; Tuckerman v. Home Ins. Co., 9 R. I. 414.

[15] Ely v. Ely, 80 Ill. 532; Ins. Co. v. Hoven, 95 U. S. 242; Mitchell v. Home Ins. Co., 32 Iowa, 421.

[16] Shaw v. Etna Ins. Co., 49 Mo. 578; Etna Ins. Co. v. Jackson, 16 B. Mon. 242; Herkins v. Rice, 27 N. Y. 178.

[17] May on Ins., §§ 80, 81, 95.

[18] Nussbaum v. Northern Ins. Co., 37 Fed. Rep. 524.

executed shall be void, and no right of action thereon maintainable. The usual phrase is that if "the insured shall have" already or thereafter put any insurance upon the property; but sometimes the phrase used is broader, "that if there shall have been already any other insurance, or shall thereafter be any placed thereon," the policy shall be void. As a general rule, the phrase other insurance refers to an insurance of the same interest and not to the interest in the same property held by persons other than the insurer, and, therefore, other insurance placed upon the property insured, especially after the first insurance is placed thereon, by the mortgagee, or by any person having a right to insure who is not the first insurer, does not avoid the policy. Where the clause was that if "the assured shall have already any other insurance against loss by fire on the property hereby insured," of which no notice was given, the policy should be void, it was held that a prior policy held by the vendor of the property, of which no notice was given by the insurer, the vendee, was not such an insurance as avoided the last, the vendee's policy. "To constitute a double insurance," said the court, "both the policies must be upon the same insurable interest, either in the name of the owner of that interest, or in the name of some other person for his benefit." And it added: "The plain and obvious meaning of the whole clause is, that if the assured has any other policy of insurance upon the property, by assignment or otherwise, by which the interest intended to be insured is already, either wholly or partially, protected, he shall disclose that fact and have it indorsed on the policy, or the insurance will be void, and the same when he shall make any subsequent insurance."[19] There are a number of decisions to the same effect.[20] A still stronger case was when the policy provided that "if the assured, or any other persons or parties *interested*, shall have existing, during the continuance of this policy, any other contract or agreement for insurance (whether valid or not) against loss or damage by fire, on the property hereby insured, not consented to by the company," "then this insurance shall be void." The phrase, "other persons or parties interested," was held to refer to parties interested in the insured's insurance merely, and that it was not the understanding or intention that any other person who might have a separate interest in the *property*, and not connected in interest with the plaintiff, and having no interest in his insurance, might avoid the plaintiff's contract by obtaining an insurance of his own interest in the property, without the insured's knowledge or consent.[21] Nor can such a clause prevent a mortgagee from insuring his own risk; nor can the mortgagee invalidate his mortgagor's prior insurance by insuring his own interest.[22] So even where the mortgagee provided that the mortgagor should keep the building on the mortgaged premises insured, and assign the policy to the mortgagee, and that in case he failed to so insure, the latter might procure such insurance at the expense of the mortgagor, and add the amount paid for it to the mortgage; it was held that insurance placed thereon by the mortgagor, acting for himself and in his own interest, did not avoid the prior insurance.[23] Yet where the loss, if any, was made "payable to J. W. Van A., as his interest appears," and it contained the usual clause avoiding it because of double insurance; and at the time J. W. Van A. held a mortgage, of which fact the insurance company were not informed, and the mortgagor subsequently procured another policy, without the knowledge of the mortgagee, in his own favor, from another insurance company, it was held that the first policy was avoided by his act, for it was not a case of two policies issued upon two different insurable interests, but both covered the same interest—the interest of the owner of the mortgaged property.[24] And so

[19] Ætna Fire Ins. Co. v. Tyler, 16 Wend. 385; s. c., 30 Am. Dec., 90; 1 Bennett's Fire Ins. Cas. 576; affirming 12 Wend. 507.

[20] Rawley v. Empire Ins. Co., 3 Keyes, 557; McMaster v. N. A. Ins. Co., 55 Ind. 222; s. c., 14 Am. Rep. 239; Pitney v. Glen Falls Ins. Co., 61 Barb. 335; s. c., on appeal, 65 N. Y. 6; Phillips v. Perry Co. n s. Co., 7 Phila. 673; s. c., 27 Leg Int., 324.

[21] Acer v. Merchant's Ins. Co., 57 Barb. 68.

[22] Guest v. Fire Ins. Co., 66 Mich. 98; s. c., 33 N. W. Rep. 31; Carpenter v. Continental Ins. Co., 61 Mich. 635; 28 N. W. Rep. 749.

[23] Titus v. Glen Falls, 81 N. Y. 415; Carpenter v. Continental Ins. Co., 61 Mich. 635; s. c., 28 N. W. Rep. 749.

[24] Van Alstyne v. Ætna Ins. Co., 14 Hun, 300; Richmond v. Niagara Fire Ins. Co., 15 Hun, 248; s. c., revised on other points, 79 N. Y. 230; Hine v. Homestead Fire Ins. Co., 29 Hun, 84; affirmed, 93 N. Y. 75; Grosvenor v. Atlantic Fire Ins. Co., 17 N. Y. 391; Birdwell v. Northwestern Ins. Co., 19 N. Y. 179; Perry v. Lorillard Fire Ins. Co., 61 N. Y. 214, affirming

where the mortgagor assigns the policy to the mortgagee, any second insurance the mortgagor may thereafter put on the mortgaged premises avoids the first policy,[25] although not, perhaps, if the mortgagee were to take out additional insurance.

5. *Mortgagor or Mortgagee cannot be Compelled to Pro Rate with Others.*—If a policy is issued directly to the mortgagee then he is not compelled to *pro rate* with the mortgagor, and so the mortgagor is not compelled to *pro rate* with the mortgagee, if the foregoing rules are applicable to the question, and there is no reason why they are not. Thus, where a policy was issued to a mortgagor which contained the usual clause of *pro rating* if other insurance should be taken out, it was said in a dictum that the mortgagor was not bound to *pro rate* with insurance subsequently taken out by the mortgagee.[26] A policy was issued directly to a mortgagee, which contained the following clause: "Nor shall the insured be entitled to recover of this company any greater proportion of the loss or damage than the amount hereby insured bears to the whole sum insured on said property, whether such other insurance be by specific or by general or floating policies, and without reference to the solvency or the liability of other insurers." On the day of the date of this policy, the mortgagors caused a policy previously taken out by them on this interest in this and other property of theirs to be made payable to the mortgagee, "as his interest appears," and subsequently took out two other policies on their interest in other property of theirs and the mortgaged property. These were also made payable to the mortgagee, "as his interest appears." The mortgagee had previously requested them to secure him for a debt due him from them, other than the mortgage debt, by policies of insurance payable to him on property other than the mortgaged property; but he did not know till after the loss that any of these policies had been taken out, except the one in suit. The defendant company contended that, under the provisions of the policy quoted, the mortgagee could recover only such amount of the sum insured of the policy as the amount bore to the whole sum insured by all the policies, he having received on the last three policies some fifty-five hundred dollars, which he applied in part payment of a debt of sixty-two hundred dollars due him from the mortgagors, in addition to the mortgage debt. But this contention of the defendant, who had issued the policy directly to the mortgagee, was overruled, and the company held liable for an amount not exceeding the amount of the mortgage debt, regardless of the amount he had previously received. Speaking of the provision quoted, the court said: "This provision refers to other insurance by the same person, or to other insurance of the same interest. It does not apply to the case of separate insurance by mortgagor or mortgagee, or by different mortgagees upon the same property. The phrase 'property hereby insured' refers to the interest of the assured." "Parties to the contract," added the court, "could not have contemplated or intended a construction by which the contract could have been affected or avoided by the acts of third persons over which they could have no control." And finally: "As these policies were not upon his interest as mortgagee; as they were not taken upon the mortgaged property with his knowledge or by his request, as, in fact, if the subsequent policies were not invalid, they applied only to the separate interest of the mortgagor—they do not furnish any defense to the suit upon the policy."[27] "But no one can suppose for a moment," said Chancellor Walworth, "that these underwriters intended to be so unreasonable as to require a person insuring with them, under a penalty of a forfeiture of his policy, to give notice of other insurance which any former owner of the property might have made thereon, although he had no interest in that insurance, and the right of the company could not in any way be affected thereby; and if there was any such insurance, even in those cases where the fact was notified to the underwriters, the person insured with them should only receive a part of his loss from them, although he had no interest in and could not be benefited by the other insurance. To suppose the under-

6 Lans. 201; Hastings v. Westchester Fire Ins. Co., 73 N. Y. 141; Gillert v. Liverpool, etc. Ins. Co., 73 Wis. 203.

[25] State v. Mutual Fire Ins. Co., 31 Pa. St. 438; Imperial Fire Ins. Co. v. Dunham, 117 Pa. St. 460; Lyconing Co. v. Mitchell, 48 Pa. St. 367; Buffalo Steam Engine Works v. Sun Mutual Ins. Co., 17 N. Y. 401.

[26] Adams v. Greenwich Ins. Co., 9 Hun, 45; affirmed, 70 N. Y. 166.

[27] Johnson v. North British & M. Ins. Co., 1 Holmes, 117.

writers intended that such a construction should be given to this part of the policy, would be to suppose that they intended to entrap those who insured with them."[28] So where two separate mortgagees took out separate policies payable to themselves, each containing the usual apportionment clause, it was held that there could be no apportionment enforced.[29]

6. "*Union Mortgage Clause.*"—A very common practice in insurance in favor of mortgagees is to attach to the policy of insurance a clause usually known as the "Union Mortgage Clause." It is peculiar in the language used, and is evidently the result of a compromise between the insurance and loaning companies. Up to date it is believed that there are no reported cases construing it. That part of it material to the question under discussion will be found below.[30] Two methods of practice are adopted in the use of this clause: To issue the policy in the name and directly to the mortgagee, or to issue it to the mortgagor payable to the mortgagee, "as his interest may appear." Insurance companies claim that if the mortgagor, although wholly without the knowledge of the mortgagee, or against his consent, place other insurance on the mortgaged premises in favor of himself, the mortgagee's insurance must be *pro rated* with the mortgagor's insurance. The effect of this rule is that the more insurance the mortgagor places upon the mortgaged premises, just to that extent he diminishes the value of the mortgagee's insurance and lessens, to the same extent, his security. It is believed that this is not the true construction of this clause. In interpreting this clause it must be borne in mind that although the courts in construing a policy "should give it a fair and liberal interpretation, such as, under all the circumstances of the case, appears most consonant to the intention of the parties at the time the contract was made;" yet "when the words of a promise are doubtful they are to be construed in the sense in which the promisor knew or thought the promisee would understand them; and if the intention of the parties is doubtful, the construction is to be in favor of the promisee."[31] Now, the clause under consideration provides that the insurance, "as to the interest of the mortgagee," "shall not be invalidated by any act * * * of the mortgagor or owner of the property insured;" and to permit the mortgagor to take out other insurance so as to reduce the amount that would otherwise be due the mortgagee is to contravene the spirit of this clause, if not its true meaning. So the phrase "other insurance," as used in the last clause, according to the authorities cited in this article, with reference to that kind of insurance rendering a policy void, means additional insurance upon the same insurable interest, and not additional insurance upon another insurable interest. If there is any doubt whether more than one insurable interest was meant, then that doubt must be resolved in favor of the mortgagee, under general rules of construction, and especially under the spirit of this clause. Inasmuch as

[28] Ætna Fire Ins. Co. v. Tyler, *supra*.

[29] Fox v. Phœnix Fire Ins. Co., 52 Me. 333. "When it [the policy] speaks of other insurance on the property it has reference to an insurance to which the assured can resort for a part of his indemnity. The clause was inserted in the policy to restrain the insured, if he had more than one policy, from recovering more than a proportional part of the loss on any one policy." Mutual Safety Ins. Co. v. Hone, 2 N. Y. 235.

[30] Loss, if any, payable to——mortgagee or trustee, as hereinafter provided: It being hereby understood and agreed, that this insurance, as to the interest of the mortgagee or trustee, only therein, shall not be invalidated by any act or neglect of the mortgagor or owner of the property insured, nor by the occupation of the premises for purposes more hazardous than are permitted by the terms of this policy. Provided, that in case the mortgagor or owner neglects or refuses to pay any premium due under this policy, then, on demand, the mortgagee or trustee shall pay the same. Provided also, that the mortgagee or trustee shall notify this company of any change of ownership or increase of hazard which shall come to his or their knowledge, and shall have permission for such change of ownership or increase of hazard duly indorsed on this policy. And provided further, that every increase of hazard not permitted by the policy to the mortgagor or owner, shall be paid for by the mortgagee or trustee on reasonable demand, and after demand made by this company upon, and refusal by the mortgagor or owner, to pay, according to the established schedule of rates. It is, however, understood that this company reserves the right to cancel this policy, as stipulated in the printed conditions in said policy; and also to cancel this agreement on giving ten days' notice of their intention to the trustee or mortgagee named therein, and from and after the expiration of the said ten days this agreement shall be null and void. It is further agreed, that in case of any other insurance upon the property hereby insured then this company shall not be liable under this policy for a greater portion of any loss sustained than the sum hereby insured bears to the whole amount of insurance on said property, issued to or held by any party or parties having an insurable interest therein.

[31] May on Ins. § 172, A. (3rd ed).

the mortgagee insisted upon the use of this clause, and which insurance companies are disinclined to use, it is a fair inference from his conduct that the promisor knew or thought the promisee understood it to be a better protection for him and his interest, rather than a possible or even probable diminution of the amount of his insurance; and such being the case, that construction of the mortgagee is the binding one. Lastly, the most that can be claimed in favor of the insurer is that his and the insured's intention is doubtful, and, therefore, the construction must be in favor of the latter.[32] The object in inserting the clause against other or double insurance, and requiring a *pro rating*, must be borne in mind. It is to take away the temptation from the insured of insuring his property beyond its value and then burning it down, and getting a profit in the transaction, or thereby diminishing his vigilance in protecting the property, relying upon the fact that he would be benefited by its destruction. The construction of the Union Mortgage Clause, contended for by the insurance companies, entirely ignores the object of the usage of such a clause in an ordinary policy, and virtually lays a trap for the mortgagee.[33] Where the policy is taken out in the name of the mortgagor, but payable to the mortgagee, "as his interest may be," as has been shown, the mortgagee stands in the shoes of the mortgagor, and what everacts of the mortgagor would render the policy void in his hands will likewise render it void in the hands of the mortgagee. But the attachment of the mortgage clause to the policy shows that it was the intention of the insured and the mortgagee to enter into a contract which the mortgagor could not impair; and hence the rule of construction referred to is set aside and has no bearing on the question—it has no place with it, and the policy is to be construed as if it had been issued directly to the mortgagee, without the use of the mortgagor's name.

W. W. THORNTON.

Indianapolis, Ind.

[32] See language of the Chancellor quoted from Ætna Fire Ins. Co. v. Tyler, *supra*.

[33] The case of Acer v. Merchant's Ins. Co., *supra*, although not on the exact point here discussed, seems decisive of this question.

WILLS—REVOCATION.

HAZLETON V. REED.

Supreme Court of Kansas, April 11, 1891.

It may be laid down as a general rule that a written instrument which discloses the intention of the maker respecting the posthumous destination of his property, and which is not to operate until after his death, is testamentary in its character, and not a deed or contract, and may be revoked.

HORTON, C. J.: This was an action brought in the court below by the widow and minor children of John Hazleton, deceased, against James C. Reed, executor of the last will of Henry Ricket, deceased, and other parties, to enforce an alleged contract for the conveyance of certain real estate executed on the 9th of March, 1883, by John Hazleton and Henry Ricket. Henry Ricket died on the 15th of September, 1883. John Hazleton died on the 9th of April, 1888. Upon the part of the plaintiffs it is claimed that, within the terms of the contract, Ricket was under obligation to make such provisions by deed or will as would vest the title to the land in Hazleton; that the mere method or form adopted for this purpose cannot be held to be material, so that the intention of the parties is carried out; that it is the duty of the court to ascertain the intention of the parties with reference to the subject-matter of their agreement, when that can be done; that it was the intention of both Ricket and Hazleton that the land should become the property of the latter upon the former's death; and therefore that the district court erred in sustaining the demurrer of the defendants, upon the ground that the petition did not state sufficient facts to constitute a cause of action. The written memorandum of the alleged contract was under consideration by this court in the case of Reed v. Hazleton, 37 Kan. 321, 15 Pac. Rep. 177. The facts of this case, together with a copy of the memorandum, are recited in full in the foregoing case, and need not be repeated here. In the former opinion handed down it was said: "Under the view which we take of this instrument, it will be unnecessary to examine the nature of a contract of bargain and sale, and a covenant to stand seized to the use of the grantee, which are discussed in the briefs filed in this action. We believe that it ought not to be placed in either of those classes of conveyance. * * * This article of agreement does not contain any of the usual operative words of a conveyance, with the possible exception of this clause: 'After the death of said Henry Ricket, of the first party, the right and title of the land in question shall vest in the said John Hazleton, of the second party.' That provision has no present operation, and could be revoked by the grantor at any time. It was testamentary. * * * The old man wisely kept in possession and control of his home, to prepare for the possible change in the feelings of himself and Hazleton. Hazleton was not without recourse if he had performed services for

which he had not been paid. He could have presented his claim against the estate, and the courts were open to aid him in obtaining his dues." This disposes of the case. In Turner v. Scott, 51 Pa. St. 126, on the 22d of November, 1849, the father, John Scott, executed an instrument to his son, John W. Scott, purporting to convey his farm. The consideration for the execution of the instrument was the natural love and affection which the father had for his son, and also an agreement from the son that he was to live with the father, assist him in his work on the land, and maintain the mother during her natural life, if she survived her husband. The instrument contained the following provisions: "Excepting and reserving, nevertheless, the entire use and possession of said premises, unto the said John Scott and his assigns, for and during the term of his natural life; and this conveyance in no way to take effect until after the decease of the said John Scott, the grantor." The son commenced to live with his father upon the land mentioned in the instrument, but after a time they quarreled. The father turned the son out, and on the 26th of February, 1861, made a will revoking the instrument executed to his son, which had been put upon record in the proper county. The chief justice of the court, in construing the written instrument from John Scott to his son, John W. Scott, said: "We see nothing in the covenant of warranty to change our construction of the operative words of the grant. As these words were expressly limited to take effect only after the death of the grantor, they were necessarily revokable words. The doctrine of the cases is that, whatever the form of the instrument, if it vest no present interest, but only appoints what is to be done after the death of the maker, it is a testamentary instrument. It signifies nothing that the parties meant to make a deed instead of a will. If they have used language which the law holds to be testamentary, their intention is to be gathered from the legal import of the words they have employed, for all parties must be judged by the legal meaning of their words." In Leaver v. Gauss (Iowa), 17 N. W. Rep. 522, Leaver and wife executed to Gauss an instrument somewhat in the form of a deed, but it was provided therein that it should take effect only after the death of himself and wife. It is claimed that a valuable consideration was paid therefor by Gauss. One of the provisions of the written instrument was "that the grantee is to take no estate during the lives of the grantors." In that case it was held that "a deed which recites, as one of its express provisions, that 'the grantee is to take no estate during the lives of the grantors,' is testamentary in its character, and, even if consideration was paid for it, may be revoked; no present estate subject to a life-estate being created thereby." In Sperber v. Balster, 66 Ga. 317, August Kohler, executed a written instrument purporting to convey to Sophestina Sperber 650 acres of land, in consideration of services rendered him by Sophestina as a nurse. The instrument provided "that it should have full effect at his death." The chief justice of the court said in that case that "it is wholly unnecessary to cite cases or invoke precedents in construing a paper like this, with a view to get at his meaning in respect to the time when he intended title, right, property, to pass out of himself into the object of his bounty. It is enough to lay down the universal principle, embodied in our Code § 2395, which is in these words: 'No particular form of words is necessary to constitute a will; and in all cases, to determine the character of an instrument, whether it is testamentary or not, the test is the intention of the maker, from the whole instrument, read in the light of the surrounding circumstances. If such intention be to convey a present estate, though the possession be postponed until after his death, the instrument is a deed; if the intention be to convey an interest accruing and having effect only after his death, it is a will.' So reading this instrument, we construe it to be clearly a will; at all events, we all hold that such is the better legal view of it." In Kinnebrew v. Kinnebrew, 35 Ala. 628, it was decided that "an instrument under seal, in form of a deed of gift, by which the grantor, in consideration of the natural love and affection for the grantee, who was his grandson, and the present payment of five dollars by the grantee, conveys, to the latter, by the words 'do by these presents give and grant' a slave, 'and fifteen hundred dollars in cash, to be paid to him out of my [grantor's] estate at my death, by my executor or administrator,' held a deed of gift as to the slave, but as to the money a purely voluntary executory trust, which a court of equity would not enforce as an instrument *inter vivos*, but which was valid and operative as a will." On the part of the plaintiff counsel refer with great confidence to the case of Sutton v. Hayden, 62 Mo. 101. In that case an arrangement was made by Mrs. Green with her brother to take his daughter, her own niece and godchild, and make her her heir at her (Mrs. Green's) death. Subsequently she promised that if the niece would come and live with her (Mrs. Green), and would be a daughter to her and nurse and take care of her the remainder of her life, all that she had should be hers (the niece's) at her (Mrs. Green's) death. The niece, Nancy A. Sutton, accepted the offer, and, relying upon the promises of her aunt, entered into her services, and continued with her about 15 years. Mrs. Green failed to make any deed or will, and died intestate. In that case the court held that a specific performance of the agreement of Mrs. Green could be compelled in equity, and that case is followed in several other Missouri cases. This case, however, is quite different from them in many particulars, especially in this: that Hazleton did not care for Ricket but a comparatively short time—from the 1st of April, 1882, until the 15th of September, 1883, when Ricket died. By the express provisions of the articles of agreement, Ricket was to retain during his life-time and peaceable possession of all the land, and Hazleton was to live with Ricket—not

Ricket with Hazleton—and Hazleton was to have no right or title in the land until after the death of Ricket, The provision in the article of agreement concerning the land in dispute was held by us in the former opinion to be testamentary only. We adhere to this ruling. "It may be laid down as a general rule that an instrument in the form of a deed, signed, sealed, and delivered as such, if it discloses the intention of the maker respecting the posthumous destination of his property, and is not to operate until after his death, is a will, and not a deed. 19 Cent. L. J. 47.

The difference between the cases cited in the former opinion and the case of Sutton v. Hayden, *supra*, and other similar cases, is this: that in former cases the courts seem to think that the grantees could have recovered for any claim or service which they could establish, without seeking relief in a court of equity; in the latter cases the courts evidently proceeded upon the theory that the law furnishes no standard whereby the value of such services can be estimated, and equity can only make an approximation in that direction by decreeing the specific execution of the contract. In the Sutton-Hayden Case the niece gave for many years to the discharge of her manifold cares, down to the period of her aunt's death, an unhesitating and unwearied tenderness and attention, which are only bestowed where affection prompts them. In Barkworth v. Young, 4 Drew, 1, A, on the marriage of his daughter with B, agreed to leave his daughter an equal portion with his other children. Of course, in such a case, no compensation could be agreed upon or established, and equity alone could afford relief. In Rhodes v. Rhodes, 3 Sandf. Ch. 279, the services therein contracted for could not and were not intended to be compensated with money, and were also incapable of computation by any pecuniary standard. In this case the services of Hazleton with Ricket were so brief, being only for about 18 months, that the value of the same could easily be computed. The judgment of the district court will be affirmed. All the justices concurring.

NOTE.—The rule stated in the principal case for determining the character of an instrument is supported by a long line of authorities. It has been held, almost without an exception, that where the writing assailed expressed an intention that no estate should vest till the grantee's death, that it was a will instead of a deed or contract. See Leaver v. Gauss, 17 N. W. Rep. 522. And the fact that a valuable consideration passed from the grantee to the party executing the instrument is of no consequence except as evidence showing the intent of the parties where such intent must be arrived at by drawing conclusions which are in the spirit though not in the letter of the instrument. Nor is the character of the instrument changed by the fact that it was executed in pursuance of a previous promise or obligation appearing upon its face. Such an instrument, if to have operation only after the death of him who executed it, is still testamentary, and is liable to revocation and entitled to probate if not revoked. *Re* Diez, 50 N. Y. 88.

In jurisdictions where writings of a testamentary sort are permitted to rank as wills without any signing or attesting, it is oftentimes difficult to determine whether a certain writing found among the papers of a deceased person was to all intents an instrument disposing of his property. Much of this difficulty is removed, however, where, as is now quite general, the instrument must be signed, attested by two or three witnesses, and contain a formal attesting clause. But many instruments are executed with all the formalities insisted upon for wills which still leave room for doubt as to whether they are intended to be deeds, contracts or testamentary papers. It is well established that no particular form of written testament can be insisted upon, provided the person executing it intended that it should take effect only at or after his death. An intention to create a will entitles the instrument to probate, however inartificial its form, provided the requirements of the statute law are sufficiently complied with. Leathers v. Greenacre, 53 Me. 561; High's Case, 2 Doug. 515; Dunn v. Bank of Mobile, 2 Ala. 152; Carey v. Dennis, 13 Md. 1; Symmes v. Arnold, 10 Ga. 506; Brown v. Shand, 1 McCord, 509. It is the *animus testandi* that usually determines the character of the instrument (Lyles v. Lyles, 2 Nott. and M. 531); and the intention of the maker must be read in the light of the transaction itself, as shown by the wording of the instrument and all the surrounding circumstances. The rule of construction, therefore, is that if the instrument passes a present interest, although the right to its possession and enjoyment may not accrue till some future time, it is a deed or contract; but if the instrument does not pass an interest or right till the death of the maker, it will be considered a will or testamentary paper. Craven v. Winter, 38 Iowa, 478; Johnson v. Yancey, 65 Am. Dec. 646; Burlington University v. Barrett, 92 Am. Dec. 376; Swails v. Bushart, 2 Head. 563; Jackson v. Culpepper, 3 Ga. 569. But if the intention be to convey a present estate upon the execution of the instrument, the paper is a deed and not a will. And it need not carry a present interest in possession, for any grantor may reserve to himself or create for another's benefit a life estate by way of precedence. Babb v. Harrison, 9 Rich. Eq. 111. In other words, what the author would have called the instrument is not the test; but whether it shall operate as a deed or will is to be governed by the provisions of the instrument itself as explained by the surrounding circumstances. Habergham v. Vincent, 2 Ves. Jr. 231. The principal question is whether the instrument, regardless of its form, passes a present interest. If it does not, but is to have no operation till the death of the maker, it is a will, otherwise it is a deed (Sharp v. Hall, 5 South. Rep. 597; *In re* Beebe, 6 Dem. Sur. 43; Robinson v. Schly, 6 Ga. 527; Gilman v. Masters, 42 Ala. 365; Comer v. Comer, 11 N. E. Rep. 84); and the addition of a seal to an instrument intended to be a will does not make it a deed. Wuesthoff v. Germania Life Insurance Co. (N. Y.), 14 N. E. Rep. 811.

Chief Justice Brickell says, in Jordan v. Jordan, 65 Ala. 301: "It is not a matter of moment what is the designation of an instrument on its face, nor how it may have been received and acted upon by the parties having beneficial interests under it. The true inquiry is as to the effect and operation the party making it intended it to have. A will is an instrument by which a person makes a disposition of property to take effect after his death; and as its operation is postponed during life, it is, in its own nature, ambulatory and revocable. It is this quality which distinguishes it from deeds and other similar instruments of transfer or conveyance, taking effect, if at all, at the time of execution." See 1 Wm's Ex'rs, 107; Glynn v. Og-

lander, 2 Hagg. 428; Walker v. Jones, 23 Ala. 448; Crain v. Crain, 17 Tex. 80; Cumming v. Cumming, 3 Ga. 460; Hileman v. Bonslaugh, 13 Pa. St. 344; Evans v. Smith, 28 Ga. 98; Mosser v. Mosser's Ex'rs 32 Ala. 551; Edwards v. Smith, 35 Miss. 197; Hart v. Rust, 46 Tex. 556; Ritter's Appeal, 59 Pa. St. 9; Hall v. Burkham, 59 Ala. 349.

It has been said that the intention is to govern, but it signifies nothing that the parties intended to make a deed instead of a will, if they use language which makes the instrument in effect what the law holds to be testamentary. *In re* Lautenschlager's Estate, 45 N. W. Rep. 147. The instrument in controversy in the case of Turner v. Scott, 51 Pa. St. 126, was in the form of a warranty deed of lands to the son, in consideration of natural love and affection, and the son's agreement to live with the father, assist him in working the land, and maintain his wife if she survived him, *habendum* after the grantor's death. But the use of the premises was reserved to the father and his assigns for his natural life. The son recorded the instrument as a deed, but it was held to be a will. Instruments in the form of deeds have been probated in many instances. Dudley v. Mallory, 4 Ga. 52; Golding v. Golding, 24 Ala. 122; Patterson v. English, 71 Pa. St. 454; Jordan v. Jordan, 65 Ala. 301; Belcher's Will, 66 N. C. 51; Hall v. Bragg, 28 Ga. 350; Turner v. Scott, 51 Pa. St. 126; Singleton v. Bremar, 4 McCord, 15; Millican v. Millican, 24 Tex. 426; Sarter v. Sarter, 39 Miss. 760.

The same principles were affirmed by the court in the case of Reed v. Hazleton, 15 Pac. Rep. 177, in which it was said: "If an instrument of writing passes a present interest in real estate, although the right to its possession and enjoyment may not accrue until some future time, it is a deed or contract; but if the instrument does not pass an interest or right until the death of the maker, it is a will." By the instrument in the case of Turner v. Scott, 51 Pa. St. 126, John Scott gave property to his son after his death, and strengthened that by saying: "In no way to take effect during my life." The considerations expressed are those usual in a devise to a son, and the son took the instrument *cum onere*, that it was to have no effect in the father's life, and it was declared to be a will. Mr. Justice Buller said, in Habergram v. Vincent, 2 Ves. Jr. 204: "The cases that have established this principle are both at law and in equity. In one of them there were express words of immediate grant, and a consideration to support it as a grant, but as upon the whole the intention was that it should have a future operation after death, it was considered as a will." In Green v. Proude, 1 Mod. 117, the instrument was sealed and delivered as a deed, but the court held it to be a testamentary paper. In the case of Sperber v. Balster, 66 Ga. 317, the instrument contains this provision: "In consideration of services rendered," * * * "I make this my deed of gift to her. I do grant, give, bargain and convey all that tract, etc. Said deed of gift to be of full effect at my death." The court said: "These words show the intention of the maker to convey what would be on the premises at his death, and to have his gift of the land to go into effect at the same time." The paper contained several *habendum* clauses, and the court added: "It is only necessary to refer to the three several *habendums* in this paper to show the impropriety of applying rules of art in the construction of papers artistically drawn to an instrument so inartistically constructed. Neither the maker nor the draftsman, it is fair to infer, had the slightest conception of the legal effect of the *habendum* and *tenendum* clauses of a deed; and to make the intention of the first and the expression of that intention by the latter turn on any rule laid down in the books touching the office of the clause, would be the heighth of folly. The true meaning of the maker here, whether to part with title at once or on his death, must be gathered from the entire paper. * * * It is wholly unnecessary to cite cases or invoke precedents in construing a paper like this with a view to get at his meaning in respect to the time when he intended title, right, property to pass out of himself into the object of his bounty. It is enough to lay down the universal principle embodied in our Code, which is in these words: 'No particular form of words is necessary to constitute a will, and in all cases, to determine the character of an instrument, whether it is testamentary or not, the test is in the intention of the maker, from the whole instrument, read in the light of the surrounding circumstances.'"

A man about to set forth on a journey executed a writing stating that he felt unwell, and directing, if he did not get back, that a certain disposition be made of his property. He was brought home ill and died soon after. An effort was made to have the writing admitted to probate, but the court held that the contingency upon which it was to have become operative had not happened. Morrow's Appeal, 116 Pa. St. 440.

In Cover v. Stern, 67 Md. 440, A had given C the following writing: "At my death my estate or my executor pay to C the sum of $3,000," and it was held on suit to recover that the instrument was not a bill obligatory, but merely a testamentary paper, and void because witnessed by only one person.

Justice Miller, in discussing the requirements of a testamentary instrument, in Byers v. Hoppe, 61 Md. 207, said: "It is not necessary to the validity of a will that it should contain the appointment of an executor, or that it should dispose of all the testator's property, nor does the omission to make such appointment or the failure to dispose of the entire estate afford any evidence whatever of an absence of the *animus testandi*." In this case the deceased had written on the back of a business letter which was sent by him to Ann Byers and her husband: "I have prospered and have accumulated a great amount of money, and I intend to do what I please with it, and *Ann*, after my death you are to have $40,000; this you are to have, will or no will; take care of this until my death; *Ann*, keep this to yourself." The instrument was held to be a deed. The same conclusion was arrived at in Knox's Appeal, 131 Pa. St. 220, in regard to an instrument not in form of a will, but reciting: "A few little things I would love to have done," and addressed to no one by name.

An instrument may be in part a deed and the remainder testamentary (Burlington University v. Barrett, 22 Iowa, 60; Reed v. Hazleton, 15 Pac. Rep. 177); and a paper in the form of articles of agreement have been held testamentary. Castor v. Jones, 86 Ind. 289. Chief Justice Sawyer delivered the opinion of the court In the Matter of the Estate of Wood, 36 Cal. 74, holding that this instrument is a will: "I wish $5,000 to go to John C. Cole, in the event of my dying intestate, and the balance of my property to go to Robert Beattie to be disposed of by him as his judgment may dictate."

A bond absolute in form, but placed in the hands of a third person, to be delivered by him to the obligee only on the death of the obligor, was admitted to probate. Carey v. Dennis, 13 Md. 1. A power of attorney, contracts and promissory notes have also been declared to be testamentary papers. Rose v. Quick, 30 Pa. St. 225; Hunt v. Hunt, 4 N. H. 434; Master-

mann v. Maberly, 2 Hogg. Ecc. 247; Jackson v. Jackson, 6 Dana, 257; Chaworth v. Busch, 4 Ves. 555; Wilbar v. Smith, 5 Allen, 194.

When the intention of the maker is doubtful, as expressed on the face of the paper, parol evidence may be introduced. McGee v. McCants, 1 McCord, 517; Evans v. Smith, 28 Ga. 98; Gage v. Gage, 12 N. H. 371. But such evidence will not be admitted to dispute the plain tenor of an instrument which both in form and substance is a will. Whyte v. Pollok, 7 App. Cas. 400; Sewell v. Slingluff, 57 Md. 537.

JESSE A. MCDONALD.

WEEKLY DIGEST

Of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Recent Decisions.

1. ADMINISTRATOR—Action by Heir.—Where land of an estate has been conveyed by the heirs to the administrator, parol evidence is admissible to show that it was conveyed to him in trust to sell and divide the proceeds among the heirs.—*Bitley v. Bitely*, Mich., 48 N. W. Rep. 540.

2. ADMINISTRATOR—Appointment.—Under Code Civil Proc. Cal. § 1365, letters of administration should not be granted to a wife's nephew when she leaves a husband surviving, but no issue, father, etc.—*In re Carmody's Estate*, Cal., 26 Pac. Rep. 373.

3. ADMINISTRATOR— Disqualification.— The fact that a brother is prejudiced against his sister does not disqualify him to act as administrator of his father's estate.—*In re Bauquier's Estate*, Cal., 26 Pac. Rep. 373.

4. ADVERSE POSSESSION—Running of Statute.—Where the husband, to give his wife the legal title to land, conveys to his son, who at the same time conveys to the wife, the son will be deemed to have the legal title, with power to sue, long enough to start the running of the statute of limitations in favor of one who has been knowingly allowed, since before the date of the deeds, to take and keep possession, and make valuable improvements, under the belief that he had a perfect title. —*Hayes v. McIntire*, U. S. C. C. (Mo.), 45 Fed. Rep. 529.

5. APPEAL—Intervention.—The denial of an application to intervene is a final judgment as to the petitioner, which may be reviewed in this court upon writ of error. —*Henry v. Travelers' Ins. Co.*, Colo., 26 Pac. Rep. 318.

6. APPEAL—Final Decree.—In an original injunction, attachment, and garnishment bill, a plea in abatement to the attachment, was sustained, and a decree was entered discharging the attachment, but leaving the bill still pending. *Held*, not a final decree from which an appeal would lie as a matter of right.—*Younger v. Younger*, Tenn., 16 S. W. Rep. 78.

7. APPEAL—Jurisdiction of Supreme Court.—The limitation on the power of the supreme court to review decisions of the appellate courts on questions of fact applies to decisions on claims filed in the probate courts against estates of deceased persons based upon strictly legal causes of action.—*Walker v. Alexander*, Ill., 27 N. E. Rep. 41.

8. APPEAL—Record — Extension of Time.—Where an extension of time after the end of the term is granted for filing a statement of fact, and the statement is not filed and approved within such time, it will not be considered as part of the record on appeal.—*City of Galveston v. Dazet*, Tex., 16 S. W. Rep. 20.

9. APPEAL FROM APPELLATE COURT.—The last clause of Rev. St. Ill. 1889, ch. 37, § 25, which provides that, where there is no trial on an issue of fact in an action where the amount claimed exceeds $1,000 an appeal or writ of error will lie from the appellate court to the supreme court, does not authorize a writ of error, where the judgment of the appellate court merely remands the cause to the circuit court for proceedings.—*City of Virginia v. Gipp's Brewing Co.*, Ill., 27 N. E. Rep. 196.

10. APPEAL FROM THE JUSTICE OF THE PEACE.—Under Code Civil Proc. Cal. §§ 974, 978, the undertaking on appeal from a justice of the peace must be filed within 30 days from the rendition of judgment in order to give jurisdiction, and, where it is not filed in time, the judgment on appeal, of the municipal court of appeals of San Francisco, to which it was transferred from the county court, is void.—*McKeen v. Naughton*, Cal., 26 Pac. Rep. 354.

11. ASSIGNMENT FOR BENEFIT OF CREDITORS.—A conveyance by a partnership to a trustee of all the firm property to sell and apply the proceeds to certain debts, and, after the satisfaction of such debts, to apply the residue *pro rata* to the grantors' other debts, is a general assignment, and not a mortgage.—*Preston v. Carter*, Tex., 16 S. W. Rep. 17.

12. ASSIGNMENT FOR BENEFIT OF CREDITORS. — An assignment for the benefit of creditors which provides that the assignee shall dispose of the entire property, and pay the assignor out of the proceeds a sum equal to his exemptions, is void.—*King v. Ruble*, Ark., 16 S. W. Rep. 7.

13. ASSOCIATIONS—Dissolution.—A voluntary agricultural association, organized as a joint-stock company, ceased to act. Then some of the stockholders in the old association, with others, formed an association in the name of the old one. Many of the stockholders in the old association did not join the new, which increased its capital stock, and went into partnership a race-track association. *Held*, that the new association was a distinct organization from the old, and that it did not succeed to the property rights of the old.—*Allen v. Long*, Tex., 16 S. W. Rep. 43.

14. ATTACHMENT—Title Acquired.—On general principles, attachment gives the creditor no higher or better right to the property attached than the debtor had at the time of the levy. It takes effect only on the debtor's interest, and does not *per se* affect the title.—*Fort Pitt Nat. Bank v. Williams*, La., 9 South. Rep. 117.

15. BILL OF EXCEPTIONS—Service.—Where plaintiff in error fails to serve his bill of exceptions on the opposing party within the time limited by the statute after the signing thereof by the judge, a subsequent certificate of the judge, to the effect that such failure of service arose through his delay, cannot be considered to relieve the party in default.—*Greer v. Holdridge*, Ga., 13 S. E. Rep. 108.

16. CHATTEL MORTGAGE—Conversion.—Under the provisions of the Civil Code of North Dakota, the title to chattels does not pass from a mortgagor upon the execution and delivery of the mortgage, or upon a breach of its conditions; nor does the title pass until a foreclosure has been completed. After default, as well as before, the mortgagor of chattels is the legal and equitable owner thereof, and as such has vendible interest in the chattels. A purchaser of such chattels, who merely buys, pays for, and takes possession, and does no act which is inimical to the rights of the mortgage

holder, is not necessarily a wrong doer.—*Sanford v. Bell*, N. Dak., 48 N. W. Rep. 434.

17. CLERKS OF COURT—Payment of Fees.—Act. Ill., May 28, 1881, § 1, which provides that clerks of courts shall, on going out af office, pay to the county treasurer all fees in their hands not belonging to themselves, does not apply to witness fees which have been collected by a clerk before the act went into effect.—*People v. McClellan*, Ill., 27 N. E. Rep. 181.

18. CONSTITUTIONAL LAW — Legislative Acts.— Under Pol. Code Cal. §§ 2568, 2569, subd. 6, empowering the board of harbor commissioners of the port of Eureka to make rules and regulations for the protection of navigation in Humboldt bay, and to impose penalties, the harbor commissioners cannot impose a penalty, as its imposition is a legislative act and the legislature cannot delegate such power to any other body.—*Board of Harbor Commisioners v. Excelsior Redwood Co.*, Cal., 26 Pac. Rep. 375.

19. CONSTITUTIONAL LAW—Titles of Acts.—The Illinois act of May 29, 1889, entitled "An act to create sanitary districts, and to remove obstructions in the Des Plaines and Illinois rivers," is not, as to its title, in conflict with Const. Ill. art. 4, § 13, which provides that "no act shall embrace more than one subject, and that shall be expressed in the title," since the general subject of the act is the formation of sanitary districts, and the removal of obstructions in said rivers is therein provided for because necessary to the formation of such districts.—*People v. Nelson*, Ill., 27 N. E. Rep. 217.

20. CONTEMPT — Disobedience of Subpœna.—Though Code Civil Proc. Cal. § 1991, provides that disobedience of a subpœna may be punished as a contempt, "and if the witness be a party his complaint or answer may be striken out," it is error to strike out the answer for defendant's disobedience of a subpœna *duces tecum*, where his counsel admit the contents of the document sought to be produced.—*Frazer v. Lynch*, Cal., 26 Pac. Rep. 444.

21. CONTESTED ELECTION—Declaration of Voters.—In a contest of an election, the declaration of voters, made before or after the election, are not competent to show that by reason of age or residence they were not qualified to vote.—*Rucks v. Renfrou*, Ark., 16 S. W. Rep. 6.

22. CONTRACT.—Where a plaintiff proves a *prima facie* case, and there is no evidence on the part of the defendant rebutting said *prima facie* case, a judgment in favor of the defendant if erroneous, as being against the evidence.—*Root v. Topeka Water Supply Co.*, Kan., 26 Pac. Rep. 398.

23. CORPORATION—Mortgages.—Article 236 of our constitution does not deny to citizens of Louisiana the privilege of borrowing money from foreign corporations, nor does it prohibit such corporations from lending money to our citizens, provided only that such transactions are not made in the course of business carried on by the corporations in this State without complying with the requirements of the article.—*Reeves v. Harper*, La., 9 South. Rep. 104.

24. COSTS—Equity Suits.—Where, in a suit to injoin the infringement of water rights, the questions of fact submitted to the jury are found in defendants' favor, and the chancellor finds that at no time prior to the trial did defendants interfere with or damage plaintiffs' rights, his judgment against plaintiffs for costs will not be disturbed.—*Ratcliffe v. Dakan*, Colo., 26 Pac. Rep. 341.

25. COUNTIES—Bridges.—Under the provision of statute, no action can be maintained by a county building or repairing a bridge across a stream forming a bound aryline between that and an adjoining county to recover a proportionate share of the expense from the adjoining county.—*Board v. Board*, Ind., 27 N. E. Rep. 133.

26. COUNTY BOARD — Employment of Attorney.—The board of county commissioners have authority to employ counsel, other than the district attorney, to collect the money due to the county by the State for the support of indigent persons, and the choice of such counsel is a matter within their discretion, and cannot be reviewed.—*Lassen County v. Shinn*, Cal., 26 Pac. Rep. 365.

27. COUNTY COURT — Jurisdiction — Highway. — The county court, in exercising its jurisdiction in laying out and establishing a public highway, is a court of special and limited jurisdiction, and the necessary jurisdictional facts must appear.—*State v. Myer*, Oreg., 26 Pac. Rep. 307.

28. CRIMINAL EVIDENCE—Confessions.—Confessions of the accused will not be received against him unless they are voluntary.—*State v. Mims*, La., 9 South. Rep. 113.

29. DEATH BY WRONGFUL ACT—Parties.—Under Rev. St. Mont. 1879, p. 508, § 2, providing that an action for negligently causing death shall be brought by the personal representative for the exclusive benefit of the widow and next of kin, it is essential to the action that there be a widow or next of kin, and that fact must be alleged in the complaint.—*Sorensen v. Northern Pac. R. Co.*, U. S. C. C. (Mont.), 45 Fed. Rep. 407.

30. DECEIT—Damages.—In an action against the directors of an insolvent bank for false representations whereby plaintiff was induced to deposit his money in said bank, which money he lost by reason of the insolvency of the bank, the measure of plaintiff's damages is the difference between the amount of his deposit with interest, and the value of his claim after the bank had failed.—*Baker v. Ashe*, Tex., 16 S. W. Rep. 36.

31. DESCENT OF EXEMPT PROPERTY. — Under Code Tenn. § 2288, where one died leaving exempt property, consisting of a mare and other personalty, his widow and children each took a present subsisting interest, and at the widow's death all the property undisposed of passed to the children.—*Sneed v. Jenkins*, Tenn., 16 S. W. Rep. 64.

32. EASEMENTS—Stairways.—Where complainants, by deed, have granted defendant the right to maintain a stairway on complainant's side of the partition wall between their respective buildings, and the same is constructed, and its use acquiesced in by complainants for 20 years, they have no right, in changing their building, to alter the stairway, against defendant's wish, to suit their own convenience.—*Haslett v. Shepherd*, Mich., 48 N. W. Rep. 533.

33. ELECTION CONTEST—Quo Warranto.— Where the candidate who has been declared elected, and has qualified, resigns before receiving any emoluments of office, and a successor has been appointed and has qualified, the validity of the election cannot be questioned by an election contest against said candidate, the proper remedy being *quo warranto* against his successor.—*Rafferty v. McGowan*, Ill., 27 N. E. Rep. 194.

34. ELECTIONS—Registration.—Under Act Cal. March 18, 1878, the board cannot appoint persons to advise or assist the board, in the selection and appointment of officers of election, or, independently of the registrar, to scrutinize the roll and detect fraud in registration.—*Falk v. Reis*, Cal., 26 Pac. Rep. 357.

35. EMINENT DOMAIN—Compensation.—It is error to instruct the jury that in estimating the compensation to be paid they should take into consideration all appreciable injuries and inconveniences caused by the taking to the land not taken, "although such injuries and inconveniences may be largely conjectural," since the jury might infer that speculative damages were recoverable.—*Chicago & P. R. Co. v. Hildebrand*, Ill., 27 N. E. Rep. 69.

36. EMINENT DOMAIN—Compensation.—Where the evidence shows that the proposed condemnation will necessitate rebuilding the tramway leading from a coal mine to a railroad track, evidence of the cost of rebuilding such tramway is admissible in proof of damages, though it appears that the tramway when so rebuilt will be worth more than before.—*Chicago, etc. R. Co. v. Wolf*, Ill., 27 N. E. Rep. 78.

37. EMINENT DOMAIN—Compensation.—Where a right of way for a railroad is condemned through a tract of land, the owner's damages cannot be diminished by any benefits likely to accrue from the construction of the railroad to that portion of the tract not taken.—*In-*

terstate Consolidated Rapid Transit Ry. Co. v. Simpson, Kan., 26 Pac. Rep. 393.

38. EMINENT DOMAIN—Exercise in Territories.—The territory of Arizona, though not possessing sovereignty, is clothed with authority to provide for the exercise of the power of eminent domain by the clause in the organic act which says: "The legislative power of this territory extends to all rightful subjects of legislation not inconsistent with the constitution and laws of the United States."—*Oury v. Goodwin*, Ariz, 26 Pac. Rep. 377.

39. EMINENT DOMAIN—Street Railways.—*Held*, that the provision of Comp. Laws Utah, 1888, § 3841, giving the right of eminent domain in behalf of "steam and horse railroads" may be exercised in behalf of electrical street railroads.—*Ogden City R. Co. v. Ogden City*, Utah, 26 Pac. Rep. 288.

40. EQUITY.—The principle that he who comes into equity must come with clean hands does not apply to misconduct of complainant in no wise affecting the equitable relations between the parties, and not arising out of the transaction as to which relief is sought.—*Foster v. Winchester*, Ala., 9 South. Rep. 83.

41. EQUITY—Jury Trial.—The chancery court has inherent power to make all reasonable rules upon the subject of jury trials, and a rule that "applications for a jury must be made within the first three days of the trial term" is reasonable, and enforceable. Such rule is not complied with by a demand in a replication or other pleading, but must be by motion in open court.—*Cheatham v. Pearce*, Tenn., 15 S. W. Rep. 1080.

42. ESTOPPEL IN PAIS—Pleading.—An estoppel *in pais* is new matter, and cannot be relied upon in evidence as a defense without being specially pleaded.—*Gaynor v. Clements*, Colo., 26 Pac. Rep. 324.

43. EVIDENCE—Ancient Instruments.—A deed 49 years old, which comes from the possession of those claiming under it, and which is shown to have been acted on by the grantee's having lived on the land conveyed for several years after its date, is admissible in evidence as an ancient instrument.—*Wilson v. Simpson*, Tex., 16 S. W. Rep. 40.

44. EVIDENCE—Proof of City Ordinance.—On a trial for violating a city ordinance the book identified by the recorder of the municipality as the book kept and used by the corporation for recording city ordinances is admissible to prove such ordinance.—*Mayor v. Swink*, Tenn., 16 S. W. Rep. 76.

45. EVIDENCE—Records.—A power of attorney from the patentee of land to his grantee to pay the commissions of the county where the land is located, and the indorsements thereon of the payment of taxes by the grantee are mere private papers, and not archives, though filed in the general land-office, and certified copies of such papers are not, therefore, admissible in evidence under Rev. St. Tex. art. 57, par. 5, and article 2253.—*Rogers v. Pettus*, Tex., 15 S. W. Rep. 1093.

46. EVIDENCE—Res Adjudicata — Transactions with Decedents.—Where, in an action for money had and received, there is a question whether the money was not received in part payment of a note, a judgment afterwards recovered on such note, in which such payment was not credited, is admissible in evidence in defense.—*Allen v. Jones*, Ind., 27 N. E. Rep. 116.

47. EVIDENCE OF CUSTOM.—Where a contract to build a house calls for good three-coat plastering, it is inadmissible to show, in an action for the balance due on the contract, that it is the custom of plasterers in that vicinity to slight their work, and do "drawn work," which is two-coat work, when three-coat work is contracted for.—*Cook v. Hawkins*, Ark., 16 S. W. Rep. 8.

48. EXECUTORS—Widow's Allowance.—Where a wife, because of separation from her husband, and not of the value of his estate, has been adjudged not entitled to an allowance for her support, she cannot sue to set aside a decree of final distribution discharging the executors, on the ground that property belonging to the estate was fraudulently excluded from the inventory and appraisement.—*In re Noah's Estate*, Cal., 26 Pac. Rep. 361.

49. EXEMPTIONS.—Exemption statutes should be liberally construed. The wages of debtors are exempt, according to the terms and conditions of the statute, so long as they are capable of identification.—*Rutter v. Shumway*, Colo., 26 Pac. Rep. 321.

50. FALSE REPRESENTATIONS—Subscription to Stock.—Where persons are induced to subscribe to the stock of a corporation by representations that it had a paid-up capital of a certain amount, was out of debt, and doing a profitable business, and that they would be given employment therein at specified wages, all of which representations are false, they are entitled to a decree for the cancellation of their subscription, and the return to them of the money they paid for the stock, with interest.—*Sherman v. American Stove Co.*, Mich., 48 N. W. Rep. 537.

51. FEDERAL OFFENSE — Obscene Pictures.—The offense of mailing a letter containing information where or how obscene pictures, etc., may be procured, created by Rev. St. U. S. § 3893, is complete when the letter is deposited, and an indictment therefor is not insufficient because it fails to allege that the latter actually conveyed the information to a particular person or persons.—*United States v. Grimm*, U. S. C. C. (Mo.), 45 Fed. Rep. 558.

52. FRAUDS, STATUTE OF — Parol Sale of Lands.— — verbal contract by an agent for the sale of lands whenever the owner shall perfect his title thereto is invalid under the statute of frauds, Civil Code Cal. § 1624.—*Hall v. Wallace*, Cal., 26 Pac. Rep. 360.

53. FRAUDULENT CONVEYANCES.—Plaintiff held a mortgage on part of a stock of goods which the mortgagor, who was his father-in-law, kept in his store, where he continued to do business as a merchant. There was no evidence that plaintiff had agreed that the mortgagor should sell, or that he did sell, the goods: *Held*, that the court erred in holding as a matter of law that the mortgage was fraudulent.—*Rosenthal v. Vernon*, Wis., 48 N. W. Rep. 485.

54. FRAUDULENT CONVEYANCES—Husband and Wife.—When a wife consents to a sale of her land on her husband's promise to buy her a home with the price, but she acquiesces in his buying a stock of merchandise instead, and, after contracting debts, he sells the stock, and with the proceeds buys a home in her name, her equities are inferior to those of his creditors, and the property will be subjected to the payment of his debts.—*Clay v. Trimble*, Ky., 16 S. W. Rep. 83.

55. GARNISHMENT—Affidavit.—An affidavit in a garnishment proceeding charged the garnishee with being indebted to the principal defendant, and with having property, money and effects in his hands, or under his control, belonging to the debtor: *Held*, that but one proceeding is authorized under the affidavit treated as a declaration in trover to reach the damages or property, and also for damages for money had and received where the garnishee is claimed to be indebted.—*State v. Hosmer*, Mich., 48 N. W. Rep. 549.

56. GARNISHMENT — Jurisdiction. — Under How. St. Mich. § 8087, providing for garnishee proceedings, where the principal defendant is a non-resident, and cannot be reached with personal process, it is no ground for dismissing such proceedings that the plaintiff is also a non-resident.—*Newland v. Reilly*, Mich., 48 N. W. Rep. 545.

57. GARNISHMENT—Lien.—Service of garnishment process on parties supposed to have in their control property belonging to a defendant against whom an attachment has issued, secures nothing, when made after such property has passed from the possession of the garnishees.—*Henry v. Beu*, La., 9 South. Rep. 101.

58. GARNISHMENT—Payment into Court.—Where one, after being summoned as garnishee, fails to answer for more than two months on account of sickness, and then makes affidavit that he "is indebted" to the principal defendant, the fact that he pays the money into court is a sufficient admission that the indebtedness

existed at the time of service, and he is not liable to another action by the principal defendant.—*Barber v. Howd*, Mich., 48 N. W. Rep. 539.

59. GARNISHMENT—Service of Summons.—Upon a petition to quash an execution against a garnishee issued by a justice of the peace, it appeared that the officer read to the garnishee's agent an execution in the case against the principal defendant, and verbally told him to appear and answer: *Held*, that the notice was not sufficient to warrant a conditional judgment against the garnishee.—*Illinois Central R. Co. v. Brooks*, Tenn., 16 S. W. Rep. 77.

60. GUARDIAN—Accounting.—Where to indemnify his surety a guardian gives him money belonging to the ward, and is afterwards removed, and the surety, being then solvent, is appointed in his stead, the sureties on the bond of the second guardian are liable for the money received by him before his appointment.—*Black v. Kaiser*, Ky., 16 S. W. Rep. 89.

61. HIGHWAYS—Appeal.—Under Rev. St. Ill. ch. 121, § 99, which provides that any person interested in the decision of the commissioners of highways, in regard to vacating any road, may appeal from such decision, the right of appeal is limited to owners of land adjoining that part of the road to be vacated.—*Commissioners of Highways v. Quinn*, Ill., 27 N. E. Rep. 187.

62. HIGHWAY—Crossing Railroad Track.—Where a public highway is located and established across a railroad company's right of way, the railroad company is entitled to just compensation for all its necessary expenditures in constructing cattle-guards, and such other things as are required by the statutes to be constructed by the railroad company by reason of the highway.—*Board of County Com'rs v. Kansas City*, Kan., 26 Pac. Rep. 397.

63. HIGHWAY — Crossing Railroad Track.—Where a public highway is located and established across a railroad company's right of way, the railroad company is entitled to just compensation for all its necessary expenditures in constructing cattle-guards, and such other things as are required by the statutes to be constructed by the railroad company by reason of the highway.—*Kansas Cent. R. Co. v. Board of County Com'rs*, Kan., 26 Pac. Rep. 394.

64. INDIAN RESERVATIONS—Territorial Jurisdiction.—In the absence of treaty or other express exclusion, the different Indian reservations become a part or the territory where situate, and subject to territorial legislative jurisdiction, subject, however, to the power of the general government to make regulations respecting the Indians, etc.—*Persons, etc. v. Territory*, Ariz., 26 Pac. Rep. 310.

65. INJUNCTION—Criminal Proceedings.—The proceedings instituted by defendants being criminal in their nature, a court of equity has no jurisdiction to restrain them by injunction.—*Hemsley v. Myers*, U. S. C. C. (Kan.), 45 Fed. Rep. 283.

66. INTOXICATING LIQUORS—Sale.—The sale was complete when the whisky was delivered to the express company, and the accused could not be convicted for selling without a license in the county in which it was delivered to the purchaser.—*Smith v. State*, Ark., 16 S. W. Rep. 2.

67. JOINDER OF ACTIONS—Contract.—Under Code Civil Proc. Cal. § 427, subd. 1, there may be joined in a single action a claim for damages for defendant's breach of his obligations under a certain contract, and a *quantum meruit* for the performance by plaintiff of his obligations under the same contract.—*Remy v. Olds*, Cal., 26 Pac. Rep. 355.

68. JUDGMENT—Interest—Personal Injuries. — Under Gen. St. Ky. ch. 60, § 6, providing that a judgment, except for injury to the person, etc., "shall bear legal interest from its date," and the act of March 1, 1888, amending § 6, by striking out the exception, no interest can be charged on a judgment for personal injuries entered before the amendment.—*Louisville & N. R. Co. v. Sharp*, Ky., 16 S. W. Rep. 86.

69. JUDGMENT—Setting Aside—Surprise.—The fact that a judgment is rendered in the absence of the defendant's counsel, because he relied on the clerk of the court to inform him of the day of trial, and the latter failed to do so, does not render it a judgment taken through "mistake, inadvertence, suprise, or excusable neglect, within the meaning of Code Ind. § 396.—*Western Union Tel. Co. v. Griffin*, Ind., 27 N. E. Rep. 113.

70. JUDGMENT BY STIPULATION.—As tipulation in reference to the argument and decision of a case, entered into for convenience in this court only, will not, upon a reversal of the judgment be extended to the retrial of the case below.—*Henry v. Travelers' Ins. Co.*, Colo., 26 Pac. Rep. 321.

71. JURISDICTION.—Code Civil Proc. Cal. § 52, subd. 2, limiting the appellate jurisdiction of the supreme court in certain cases to controversies involving not less than $300, does not apply to an appeal from an order of the superior court granting a writ of *certiorari* to ascertain whether a justice's court had power to make an order annulling a judgment therein.—*Heinlen v. Phillips*, Cal., 26 Pac. Rep. 366.

72. JUSTICE—Jurisdiction.— Where a complaint was filed against a defendant, and a void judgment rendered by the justice, such judgment does not terminate the action so as to prevent such justice from issuing an *alias* summons and acquiring jurisdiction of the person of the defendant.—*Southern Pac. R. Co. v. Russell*, Oreg., 26 Pac. Rep. 304.

73. JUSTICE— Jurisdiction — Receiver. — An action against a receiver appointed to receive and hold the rents of land pending an appeal in ejectment, brought by one to whom the successful party assigns her right to such rents, is not an equitable action, but an action for money had and received, and a justice has jurisdiction thereof.—*Garnes v. Superior Court of San Francisco*, Cal., 26 Pac. Rep. 351.

74. JUSTICE OF THE PEACE—Jurisdiction.—A prosecution under Mansf. Dig. Ark. §§ 1653, and 1654, is of a criminal nature and a justice of the peace has jurisdiction to inflict a fine of one hundred dollars and triple damages notwithstanding Const. Ark. 1874, art. 7, § 40 cl. 2.—*Armstrong v. State*, Ark. 15 S. W. Rep. 1036.

75. LIBEL—What Actionable.— In an action for libel the declaration stated that plaintiff, among others, rented of a corporation a stall in a building called the "Princess Market" for the sale of goods, and that defendant published in his newspaper the following words: "The Princess market is not a howling success. At no time were there more than a dozen people in the market on Saturday night:" *Held*, that the language was not libelous.— *McGraw v. Detroit Free Press Co.*, Mich., 48 N. W. Rep. 500.

76. LIEN—Labor—Lot.—A "lot," within the meaning of section 3676, of Hill's Code, is evidently not to be understood as synonymous with "tract" or "parcel," but in the sense of a city lot, as bounded and described on the recorded plats of the city, or as subdivided and bounded by conveyances of the owners thereof, or by other acts done by themselves, or the city authorities.—*Pils v. Killingsworth*, Oreg., 26 Pac. Rep. 305.

77. LIEN—Warehouseman.—Where part of the debt due from an insolvent to a bank represents advances made by the bank upon the security of bills of lading for goods afterwards assigned by the insolvent for the benefit of his creditors, and part of it presents an overdraft and other unsecured loans, and it is impossible to ascertain what proportion of the debt was advanced on such bills of lading, the bank has no lien therefor on the goods in the hands of the assignee.—*Union Trust Co. v. Trumble*, Ill., 27 N. E. Rep. 24.

78. LIFE INSURANCE—Premium—Waiver.—A provision in a policy of insurance providing for forfeiture for non-payment of premium is for the benefit of the insurer and may be waived by it.—*Mich. Mut. Life Ins. Co. v. Custer*, Ind., 27 N. E. Rep. 124.

79. LIMITATIONS—Damages.—The time limited by Gen. St. 1878, ch. 31, § 17, for bringing an action for damages

caused by the erection and maintenance of a mill dam, begins to run not from the erection of the dam but from the time when the plaintiff sustained damages thereby.—*Hempstead v. Cargill*, Minn., 48 N. W. Rep. 558.

80. LIMITATIONS—Filing Petition.—The filing of a petition with instructions to the clerk not to issue citation does not arrest the running of the statute of limitations.—*Bates v. Smith*, Tex., 16 S. W. Rep. 47.

81. LIMITATIONS—Mortgages.—A mortgage was foreclosed, and the premises bid in by the mortgagee. One who had purchased after the execution of the mortgage, and whose deed was duly recorded, was not made a party to the foreclosure. The mortgagee took possession of the premises within four years after the sale on foreclosure: *Held*, that after the expiration of the four years the mortgage could be foreclosed against the purchaser, and that the right to a foreclosure was not barred by Rev. St. Tex. 1879, art. 3205, pl.1.—*King v. Brown*, Tex., 16 S. W. Rep. 39.

82. LIMITATION IN EQUITY.—A party is entitled to bring his suit in equity any time within the statute of limitations, except in cases where there has been delay or acquiescence amounting to a recognition of the rights of the opposite party making the assertion of adverse rights inconsistent and unconscionable, or where other equitable considerations equally strong are established.—*Dunne v. Stotesbury*, Colo., 26 Pac. Rep. 333.

83. MASTER—Liability for Servant's Acts.—A railroad company is not liable for the damage done to a farm by the subcontractors, who, while constructing the road, have thrown down the fences both on and off the right of way, when these acts were not done by any direction of the company, and the subcontractors were not under the control or subject to the orders of the company or its representatives.—*St Louis, etc. Ry. Co. v. Knott*, Ark., 16 S. W. Rep. 9.

84. MASTER AND SERVANT—Contract of Employment.—Where there was no agreement to pay for extra work, and no testimony is given of a uniform and notorious custom to pay for such extra work sufficient to warrant the presumption that the contract was made with reference thereto, defendant is not liable.—*Schurr v. Savigny*, Mich., 48 N. W. Rep. 547.

85. MASTER AND SERVANT—Defective Appliances.—A railroad company is not liable for injuries to its employees caused by defects in its cars, unless by the use of reasonable diligence the defect could have been discovered.—*Allen v. Union Pac. Ry. Co.*, Utah, 26 Pac. Rep. 297.

86. MASTER AND SERVANT—Wrongful Death—Notice.—Under Act. Mass. 1887, 1888, in case of death without conscious suffering, it is not necessary to appoint an administrator to give notice but the widow or her attorney may give it.—*Gustafsen v. Washburn & Moen Mf'g Co.*, Mass., 27 N. E. Rep. 179.

87. MEASURE OF DAMAGES—Negligence.—In an action against a railroad company for so negligently constructing its road-bed as to cause the overflow of plaintiff's pasture land, the measure of damages is the value of the use of such pasture for the time that plaintiff was deprived of its use.—*Broussard v. Sabine & E. T. Ry. Co.*, Tex., 16 S. W. Rep. 30.

88. MINING COMPANY—Manager.—Where the by-laws of a mining corporation declare it the duty of the general manager to "take charge of the business of selling the ores mined," he has authority to enter into a contract with a smelting company for the sale to it of all the ores to be mined within a given period.—*Robert E. Lee Silver Min. Co. v. Omaha & Grant Smelting Co.*, Colo., 26 Pac. Rep. 326.

89. MORTGAGE—Fraudulent Conveyance.—A second mortgage may assail the first mortgage for fraud against creditors.—*Cribb v. Morse*, Wis., 48 N. W. Rep. 489.

90. MUNICIPAL CORPORATIONS—Obstructing Street.—A city may maintain a bill in equity to restrain the obstruction of streets within its limits.—*Chicago, etc. R. Co. v. City of Quincy*, Ill., 27 N. E. Rep. 232.

91. MUNICIPAL CORPORATION—Obstruction of Street.—Without express statutory authority, a municipal government cannot grant to any person the right to erect and maintain in a public street a structure, such as a permanent fish-box, for his private and exclusive use.—*Laing v. Mayor*, Ga., 13 S. E. Rep. 107.

92. MUNICIPAL CORPORATION—Paving Streets.—The fact that a city has permitted a railroad company to use one of its streets for tracks for many years does not deprive the city of the right to cause such street to be paved.—*Chicago, etc. R. Co. v. People*, Ill., 27 N. E. Rep. 192.

93. MUNICIPAL CORPORATION—Sanitary District—Constitutional Law.—It is within the power of the general assembly to authorize the formation of sanitary district as municipal corporations, without regard to the existence and boundaries of previously created municipalities, there being no provision in the Illinois constitution to the contrary.—*Wilson v. Board of Trustees*, Ill., 27 N. E. Rep. 203.

94. MUTUAL BENEFIT INSURANCE.—A membership certificate provided that the member might change the beneficiary upon complying with the laws of the society. At that time the constitution of the society provided that a change could be made in the beneficiary only with his consent, but this provision was afterwards repealed. *Held*, that the member, who had retained possession and ownership of the certificate, might, after such repeal, change the beneficiary, upon complying with the laws of society then in force, without the beneficiary's consent.—*Supreme Council v. Franke*, Ill., 27 N. E. Rep. 86.

95. NEGLIGENCE—Defective Bridges.—An instruction that if plaintiff was acquainted with the bridge, and knew the kind of timber of which it was constructed, and how long such timbers had been in the bridge, then "plaintiff is also chargeable with knowledge of the tendency of such timbers to decay incident to age and long use," is erroneous, since plaintiff is not charged with any duty in respect to the bridge, and has a right to assume that it is safe in the absence of any indication to the contrary.—*Apple v. Board*, Ind., 27 N. E. Rep. 166.

96. NEGLIGENCE—Proximate Cause.—The general rule in actions in tort is that the damages recoverable are those resulting directly from the wrongful act, whether they could or could not have been foreseen or contemplated by the wrong-doer as the probable result of the act done.—*Schumaker v. St. Paul & D. R. Co.*, Minn., 48 N. W. Rep. 559.

97. NEGOTIABLE INSTRUMENT—Forged Drafts—Indorsers.—The indorsee of a forged bill of exchange, on its dishonor, may maintain an action against his indorsers for a recovery of the consideration, which has failed, without proof of demand and notice.—*Hamer v. Brainard*, Utah, 26 Pac. Rep. 299.

98. PARTNERS—Accounting.—A managing partner is not liable to his copartners for firm property lost without any wilful disregard of duty on his part.—*Snell v. De Land*, Ill., 27 N. E. Rep. 183.

99. PARTNERSHIP—Accounting.—After the death of copartner, it was error, on a settlement of the partnership accounts, to treat the surviving partner as a trustee, and to charge him with all omissions and inaccuracies in the partnership accounts, since both partners were *in pari delicto* in so far as the unsatisfactory condition of the firm books were concerned.—*Hottel v. Mason*, Colo., 26 Pac. Rep. 335.

100. PARTNERSHIP—What Constitutes.—No partnership is created by a contract under which one party is to make a kiln of bricks, furnishing the labor and the necessary lumber, tools, and wood, for the purchase of which money is to be advanced by the other party, who is also to furnish the use of two mules and feed for them, and is to have control of the bricks until enough are sold to repay his advances, when the remainder is to be equally divided.—*Haycock v. Williams*, Ark., 16 S. W. Rep. 3.

101. PLEDGE—Corporate Stock.—Defendant, being the

owner of shares of corporate stock, deposited the certificate with a trustee under an agreement with the other shareholders that the stock should not be taken out of his possession, or put on the market before a certain time, and took a receipt from the trustee recit ing such facts. Afterwards he delivered the receipt to intervenor, with a power of attorney in blank, authorizing the transfer of the shares on the company's books; but he gave the intervenor no order for the delivery of the certificate, and no notice was given to the trustee of the transfer. *Held*, under Civil Code La. art. 3158, providing that there was no pledge of the shares as against an execution creditor of defendant.—*Bidstrup v. Thompson*, U. S. C. C. (La.), 45 Fed. Rep. 452.

102. PRACTICE—Filing Pleading.—Under the Colo. Pr. Act. of 1885, providing that the pleadings shall be filed within 10 days after service of a copy of the answer, but not imposing any penalty for a failure to file them, a defendant who has served his answer in apt time should be permitted to defend, notwithstanding his failure to file the answer within 10 days after such service of it.—*Haley v. Breeze*, Colo., 26 Pac. Rep. 343.

103. PRINCIPAL AND SURETY—Release.—Where a joint and several negotiable note is made by two, one of whom in fact signed as surety, though his suretyship is not in any way indicated in the note, such surety may avail himself of the provisions of Rev. St. Ind. 1881, §§ 1210, 1211, that "any person bound as surety" on any contract may require the creditor or obligee to institute suit on it within a reasonable time after the right of action has accrued.—*Hamrick v. Barnett*, Ind., 27 N. E. Rep. 106.

104. PROCESS—Service—Publication.—Statutes authorizing extraterritorial service of process ought to be strictly construed.—*Batt v. Procter*, U. S. C. C. (Tex.), 45 Fed. Rep. 515.

105. PUBLIC LANDS—"Swamp and Overflowed."—Where the register and receiver of the district land-office decides that certain land was not "swamp and overflowed" at the time of the enactment of Act. Cong. Sept. 28, 1850, or that the patentees thereof are entitled to it on the ground that they were before disposal of it by the State, *bona fide* purchasers within Act. Cong. July 23, 1866, providing for the quieting of land titles in California, and confirming to purchasers in good faith lands included in rejected Mexican grants, the decision, if not appealed from is conclusive against the State and its grantees.—*Shanklin v. McNamara*, Cal., 26 Pac. Rep. 345.

106. QUIETING TITLE—Fraudulent Conveyances.—In a suit to quiet title the bill alleged that complainant had conveyed the land to defendant, who had reconveyed it to complainant by an unrecorded deed that had been lost. *Held*, that it was no defense that the conveyance to defendant was made to defraud complainant's creditors.—*Springfield Homestead Ass'n v. Roll*, Ill., 27 N. E. Rep. 184.

107. RAILROAD COMPANIES—Accidents at Crossings.—A person who is familiar with a railway crossing cannot recover for injuries caused by being struck by an engine, where it appears that before entering the crossing she did not look for approaching trains, and the fact that she looked at the watchman stationed at the crossing who gave her no notice of the approaching train, does not excuse her from the excercise of care on her part.—*Cadwallader v. Louisville, etc. Ry. Co.*, Ind., 27 N. E. Rep. 161.

108. RAILROAD COMPANIES—Crossings.—A place in a railroad company's yard where the public have for a long time been accustomed to cross the track, solely by the sufferance of the company, is not a "public crossing," within the meaning of Rev. St. Mo. 1889, § 3508, relating to signals at crossings.—*Gurley v. Missouri Pac. Ry. Co.*, Mo., 16 S. W. Rep. 11.

109. RAILROAD COMPANIES—Injuries to Brakeman.—A brakeman who has his hand crushed while attempting to couple in the dark two cars with draw-heads, at an unequal height from the track, can recover for his injuries, where the company had failed to furnish suitable links for such couplings, and the conductor ordered plaintiff to take the unsuitable link with which he attempted to make the coupling.—*Denver, etc. Ry. Co. v. Simpson*, Colo., 26 Pac. Rep. 339.

110. RAILROAD COMPANIES—Taxation.—Under Rev. St. Ill. ch. 120, § 42, city lots which have been bought by a railroad company with the intention of using them as a site for its station, when it should acquire title to other adjoining lots, but which it has held for four or five years without attempting to acquire title to such other lots, form no part of its "railroad track."—*Chicago, etc. R. Co. v. City of Quincy*, Ill., 27 N. E. Rep. 200.

111. RAILROAD COMPANIES—Venue.—Rev. St. Ind. 1881, §§ 309, 312, does not make it necessary for a suit for medical services to the employee to be brought in the county of the company's residence.—*Evansville & I. R. Co. v. Spellbring*, Ind., 27 N. E. Rep. 239.

112. RAILROAD MORTGAGE—Foreclosure.—In proceedings to foreclose a mortgage on the property of a street railroad, where the bill contains no averment as to the pledging of the bonds, nor as to who were the holders of them, but only alleges that enough of them were outstanding to comply with the provisions of the mortgage as to foreclosure, an intervening petitioner cannot be expected to know these circumstances in advance of the evidence.—*Farmers' Loan & Trust Co. v. San Diego St. Car Co.*, U. S. C. C. (Cal.), 45 Fed. Rep. 518.

113. REAL ESTATE BROKER—Commissions.—A real estate broker empowered to sell real property for a commission performs his part of such contract, so as to be entitled to his commission when he brings to his employer a purchaser, able, ready, and willing to purchase the property on the terms and conditions authorized by his employer, although the sale may not be completed because of a defect in the title.—*Kyle v. Rippey*, Oreg., 26 Pac. Rep. 308.

114. REMOVAL OF CAUSES—Separable Controversy.—To an action claiming the rightful ownership of certain shares of stock in a resident corporation, which are in the name of non-resident stockholders, the corporation is an essential party, and there is no separable controversy.—*Rogers v. Van Nortwick*, U. S. C. C. (Wis.), 45 Fed. Rep. 513.

115. RIPARIAN RIGHTS—Irrigation.—The doctrine of riparian rights is not in force in Utah, so as to prevent the owner of land from diverting the waters of a stream for purposes of irrigation and domestic use, under the laws of the territory.—*Stowell v. Johnson*, Utah, 26 Pac. Rep. 290.

116. SALE—Acceptance of Goods.—Defendants agreed to buy all plaintiff's wheat, to be delivered at certain stations in car-load lots, and to be of grade No. 2. The wheat was delivered at said stations and received by defendants, who personally inspected part of it as it was delivered, and pronounced it all right. Defendants then caused the wheat to be shipped to a distant point, where it was again inspected, and pronounced not of grade No. 2 in that market: *Held*, that the contract to deliver grade No. 2 was satisfied by defendants' receiving the wheat at the place of delivery, after having inspected it, or had a fair opportunity to do so.—*Jones v. McEwan*, Ky., 16 S. W. Rep. 81.

117. SALE OF LUMBER—Amount Delivered.—Plaintiffs agreed to cut and deliver lumber for defendants at a certain dock, the settlement therefor to be made on the lumber tally on the lumber as shipped: *Held*, that plaintiffs performed their contract on delivery, and, on defendants' failure to make and preserve a tally, could prove the amount of lumber delivered by other evidence.—*Welch v. Palmer*, Mich., 48 N. W. Rep. 552.

118. SET-OFF.—In an action to foreclose a mortgage given to secure a note made to cover the difference in value of lands exchanged by the mortgagor and mortgagee, the mortgagor cannot recoup damages growing out of an exchange of personal property between himself and the mortgagee, wherein he was defrauded by the mortgagee.—*Arnold v. Daley*, Ark., 16 S. W. Rep. 9.

119. SLANDER—Privileged Communications.—Communications in a judicial proceeding are privileged, and no person is liable, civilly or criminally, in respect to anything published by him in the course of his duty in said proceeding.—*Gardemal v. McWilliams*, La., 9 South. Rep. 106.

120. SPECIFIC PERFORMANCE—Deed by Administrator.—A widow having, as her husband's administrator, executed a deed in pursuance of a void decree for the specific performance of a contract made by the husband, and the deed cannot operate as the deed of the survivor of the community.—*Houston v. Killough*, Tex., 16 S. W. Rep. 56.

121. SPECIFIC PERFORMANCE—Parol Lease.—Upon the facts held that the complaint showed a parol contract for lease of land of which there had been a part performance sufficient to take it out of the statute of frauds and that the complaint was not demurrable because of the uncertainty of description in the written contract.—*Weaver v. Shipley*, Ind., 27 N. E. Rep. 146.

122. STARE DECISIS—Legislative Question.—The decisions of this court, deliberately announced in actual litigated cases, ought not to be overruled upon *ex parte* arguments in response to legislative questions.—*In re House Resolutions*, Colo., 26 Pac. Rep. 323.

123. SUMMONS—Service — Affidavit. — An affidavit of service of summons, which does not show that the person serving it was over 18 years old when he served it, is sufficient to prove service.—*Horton v. Gallardo*, Cal., 26 Pac. Rep. 375.

124. TAXATION — Equalization. — Under charter of Grand Rapids, tit. 5, §§ 9, 10, relating to the board of review and equalization, the power of equalization by the board being confined to real estate, and the whole subject being under their complete jurisdiction, they may adopt their own means of reaching a result, which result is conclusive.—*City of Grand Rapids v. Welleman*, Mich., 48 N. W. Rep. 534.

125. TAXATION FOR SCHOOL PURPOSES. — Where the levy of a tax for school purposes is properly made, and is within the statutory limit, it is no ground for enjoining its collection that the levy was unnecessarily large, or that the directors proposed to divert part of the money raised to another purpose.—*Lawrence v. Trainer*, Ill., 27 N. E. Rep. 197.

126. TAX CERTIFICATES—Refunding.—Where a person holding a tax-sale certificate presents the same in proper time to the board of county commissioners of the county where it is issued, and asks for the refunding (payment back of the taxes, interest, etc.), of such certificate, and the certificate is so erroneous or irregular that the land or lot therein described ought not to be conveyed, the board should discover the errors or irregularities, and order the county clerk not to convey the land or lot.—*Rork v. Board of County Commissioners*, Kan., 26 Pac. Rep. 391.

127. TELEGRAPH COMPANIES — Contributory Negligence.—In an action by a father and his son against a telegraph company for failure to deliver a message it appeared that the son, a boy 15 years old, broke his arm, and on the same day his mother, in his father's absence, telegraphed for her physician. The telegram was not delivered for nine days. No further effort was made by the parents to obtain a physician until it was too late to save the arm: *Held*, that the father should not have recovered because of his contributory negligence; but a judgment for the son was proper.—*Western Union Tel. Co. v. Hofman*, Tex., 15 S. W. Rep. 1048.

128. TELEGRAPH COMPANIES—Delay.—A stipulation on a telegraph message blank that "the company will not be liable for unavoidable interruption in the working of its lines" does not cover the exclusive use for the time of the wire in sending train orders.—*Western Union Tel. Co. v. Rosentreter*, Tex., 16 S. W. Rep. 25.

129. VENDOR'S LIEN—Assignment.—Where a lien is expressly reserved in a deed of land to secure a note given for the purchase money thereof, an assignment of the note carries with it the lien as an incident of the debt, and the assignee of the note may give a valid release of such lien.—*McCamly v. Waterhouse*, Tex., 16 S. W. Rep. 19.

130. VENUE—Residence.—Under Code Civil Proc. Cal. §§ 392, 395, a suit to compel the reconveyance of both real and personal property, and for an accounting of the rents and profits by defendant, and a personal judgment against him for the amount found to be due, must be brought in the county of defendant's residence, and not where the land is situated.—*Smith v. Smith*, Cal., 26 Pac. Rep. 356.

131. WATERS—Surface Water.—Where a railroad maintains an embankment for 30 years without interruption, keeping the waters off its right of way and backing it up on higher and adjoining lands, it acquires the right to flow back-water upon the adjoining lands by prescription.—*Louisville & N. R. Co. v. Mossman*, Tenn., 16 S. W. Rep. 64.

132. WAY — Right — Prescription. — Where a person opens a way for the use of his own premises, and another uses it without causing damage, the presumption is that his use was permissive, and, in the absence of evidence to the contrary, he does not acquire a right of way of prescription.—*Harkness v. Woodmansee*, Utah, 26 Pac. Rep. 291.

133. WAY — Right — User.—Though a verbal conveyance of a private passway is within the statute of frauds, where the grantee has for 15 years used the passway through inclosed woodland, the oral agreement may be used to rebut the idea that the user was permissive, and the right to the passway is acquired by the user, though between termini the grantee at different times took several routes to avoid muddy or worn places in the route previously used.—*Talbott v. Thorn*, Ky., 16 S. W. Rep. 88.

134. WILL—Advancement.—A will devised the estate, real and personal, to the testator's three children, subject to the right of the widow to use and control the same during her life. She loaned a large sum of the funds of the estate to one of the sons, taking his note therefor. After her death the other son was appointed executor of the will, and recovered judgment for the amount of the note and interest. *Held*, that upon distribution the loan must be regarded as an advancement, and taken into consideration in equalizing and adjusting the interests of the distributees.—*New v. New*, Ind., 27 N. E. Rep. 154.

135. WILLS — Execution — Witnesses.—Under Mansf. Dig. Ark. § 6492, a will is duly executed where it is subscribed in the presence of one attesting witness, and then taken by the testator to a justice of the peace to whom he points out his signature, declares the writing to be his will, and gets the justice to sign and certify it, not as a witness, but in his official character.—*Payne v. Payne*, Ark., 16 S. W. Rep. 1.

136. WITNESS—Husband and Wife.—Under How. St. Mich. § 7546, the husband cannot testify against the wife in an action by creditors to set aside an alleged fraudulent conveyance by him, to her, as their interests are identical.—*Blanchard v. Moors*, Mich., 48 N. W. Rep. 542.

137. WITNESS — Impeachment, — Asking a witness whether he did not make certain statements at a particular place to certain persons shortly after the previous trial of the cause is not sufficient foundation for the introduction of evidence that he has made such statements shortly before such trial.—*Quincy Horse Ry & C. Co. v. Gunse*, Ill., 27 N. E. Rep. 190.

138. WITNESS — Transactions with Decedents.— Civil Code Colo. 1887, § 58, which provides that, when cross-demands have existed between two persons under such circumstances that if one had brought an action against the other a counter claim could have been set up, neither party shall be deprived of the benefit thereof by the death of the other, does not by implication repeal Gen. St. Colo. § 3641, which prohibits a party from testifying in his own behalf when the adverse party sues or defends as executor or administrator of any deceased person.—*Rathvon v. White*, Colo., 26 Pac. Rep. 323.